Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2010

Leadership is a behavior, not a position

CASE LAW UPDATES
THIRD QUARTER

KENTUCKY COURT OF APPEALS
KENTUCKY SUPREME COURT
SIXTH CIRCUIT COURT OF APPEALS

John W. Bizzack, Ph.D.
Commissioner

Department of
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The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

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Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

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Leadership Branch

J.R. Brown, Branch Manager
859-622-6591 **JamesR.Brown@ky.gov**

Legal Training Section

Main Number **859-622-3801**
General E-Mail Address **docjt.legal@ky.gov**

Gerald Ross, Section Supervisor
859-622-2214 **Gerald.Ross@ky.gov**

Carissa Brown, Administrative Specialist
859-622-3801 **Carissa.Brown@ky.gov**

Kelley Calk, Staff Attorney
859-622-8551 **Kelley.Calk@ky.gov**
Thomas Fitzgerald, Staff Attorney
859-622-8550 **Tom. Fitzgerald@ky.gov**
Shawn Herron, Staff Attorney
859-622-8064 **Shawn.Herron@ky.gov**
Kevin McBride, Staff Attorney
859-622-8549 **Kevin.McBride@ky.gov**
Michael Schwendeman, Staff Attorney
859-622-8133 **Mike.Schwendeman@ky.gov**

NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 506 - ATTEMPT

Williams v. Com.
2010 WL 2867823 (Ky. App. 2010)

FACTS: Williams was arrested "following a sting operation where an adult posed as a minor over a computer and Williams traveled to Williamsburg, Kentucky, to meet with that 'minor.'" He was indicted for Criminal Attempt of Unlawful Transaction with a Minor 1st. Williams requested the trial court dismiss the indictment because no actual minor was involved. That was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a simple belief that one is communicating with a minor sufficient to charge with Attempt to commit Unlawful Transaction with a Minor?

HOLDING: Yes

DISCUSSION: The Court reviewed the two statutes in question – KRS 530.064 and KRS 506.010. The court noted, however, that although the substantive statute requires that "an actual minor be involved, the criminal attempt statute has no such requirement." It requires only that a "substantial step towards the commission of what would constitute a crime under those circumstances as Williams believed them to be." Since Williams believed he would be meeting with a minor, that was sufficient for the criminal attempt.

Williams' plea was affirmed.

PENAL CODE – KRS 508 - CRIMINAL ABUSE

Johnson / Rutherford v. Com.
2010 WL 3515709 (Ky. App. 2010)

FACTS: In January 2007, Rutherford and Johnson lived together in Whitley County, along with Johnson's minor daughter. On January 9, Rutherford allegedly spanked the child for spilling juice on the couch. Rutherford claimed that later that day, she fell while being "playfully chased" around the house and that he also "accidentally struck" her with a belt when he "swung it around a doorway without knowing she was on the other side." The next day, at daycare, a worker noticed bruises and called CPS, which investigated and found several suspicious bruises. Det. Helton (KSP) was contacted and also viewed the marks. Det. Helton asked Rutherford and Johnson to come to the station. Johnson first stated that she saw Rutherford "lightly spank" the child, but when she was shown the photos, she stated she was actually at the grocery at the time and that Rutherford had asked her to lie.

Both were indicted. Rutherford was convicted of Criminal Abuse 1st and Johnson of Criminal Abuse 3rd. Both appealed.

ISSUE: Is proof that a parent should have seen bruises that resulted from an abuse by a third party sufficient to charge with Abuse 3rd?

HOLDING: Yes

DISCUSSION: The Court found that the evidence against Rutherford, the bruises and his admission of spanking, was sufficient to support the jury verdict. The Court further agreed that the evidence against Johnson, that she was out of the house at the time of the spanking but that she dressed the child the next morning, when the bruises would presumably have been noticeable, was sufficient to support her conviction, that she recklessly allowed Rutherford to abuse the child.

Both convictions were affirmed.

PENAL CODE - KRS 509 – KIDNAPPING EXEMPTION

Duncan v. Com.
322 S.W.3d 81 (Ky. 2010)

FACTS: Duncan was accused of a series of sexual assaults that occurred in Louisville, in the fall of 2003. Duncan was convicted and appealed.

ISSUE: Is taking a victim from one location to another, over a substantial distance and time, for the purpose of Sexual Assault sufficient to charge with Kidnapping as well?

HOLDING: Yes

DISCUSSION: Among other issues, Duncan argued that one of the detectives was permitted to improperly bolster the testimony of the victims. The victim initially misstated the perpetrator's height by approximately four inches. The detective agreed it was not uncommon for a victim to be mistaken about a suspect's height. The Court agreed that he testified "only that his experience confirmed the common sense notion that people are generally poor judges of height." In the specific circumstances of the trial, the court found the detective's testimony to be permitted.

Duncan also argued it was inappropriate to convict him of kidnapping. However, "to distinguish kidnapping from the restraint that is part-and-parcel of another offense," the "kidnapping exemption" of KRS 509.050 might apply. The Court agreed that the exemption only applies if the restraint is "close in distance and brief in time." If the "victim is restrained and transported any substantial distance to or from the place at which the crime is committed or to be committed," unlawful imprisonment might apply.[1]

To satisfy the exemption, three requirements must be met.

> (1) that the underlying criminal purpose was the commission of a crime defined outside KRS Chapter 509; (2) that the interference with the victim's liberty occurred immediately with or incidental to the commission of the underlying

[1] Timmons v. Com., 555 S.W.2d 234 (Ky. 1977).

intended crime; and (3) that the interference with the victim's liberty did not exceed that which is ordinarily incident to the commission of the underlying crime.[2]

The decision as to whether the exemption applies falls to the judge, not the jury. In this case, the victim was seized while walking down the street and was forced into an alley and then to a secluded area behind an abandoned house, which took over five minutes. The trial court properly did not apply the exemption statute.

With respect to the identification, the police first presented the victim with a photopak that included Duncan, but none of the photos showed a man wearing glasses. When she expressed doubt, a second photopak, with a more recent photo of Duncan and in which all of the subjects were wearing glasses, was presented. She then positively identified Duncan. The Court agreed that a second showing could, in some circumstances, be unduly suggestive, but that was not the case here, when the second showing was three days after the first. Duncan's photos, taken three years apart, were markedly different.

Although the Court found in favor of the Commonwealth in the issues above, the Court upheld his arguments that involved misconduct on the part of the prosecutor and remanded the case back for further proceedings.

PENAL CODE - 511 - BURGLARY

Britt v. Com.
2010 WL 3377750 (Ky. 2010)

FACTS: On May 4, 2005, in Barren County, Pytko and Johnson knocked on Flowers' door. He called to them to come into the trailer and they talked for some time. Pytko walked outside to smoke and Johnson then pulled a gun on Flowers, who tried to grab it. Pytko came back inside and shot Flowers. Baize, who had been outside, came inside and bound Flowers, demanding money. Flowers gave them money and they left.

Pytko and Johnson met Britt at a nearby motel to split the money, the robbery plan having allegedly been Britt's. He also provided the guns and duct tape. Supposedly there had been a plan to rob Flowers at an earlier time but they had "declined to rob" him at that time. Pytko later testified she only returned the second time because Britt "threatened to kill her family if she refused."

Britt was convicted with complicity to commit burglary and robbery, but acquitted of assault. He appealed.

ISSUE: Is an unlawful entry through an unlocked door, allowed by another participant in the crime who was lawfully admitted, sufficient to charge with Burglary?

HOLDING: Yes

[2] Hatfield v. Com., 250 S.W.3d 590 (Ky. 2008).

DISCUSSION: Among other issues, Britt argued that because Johnson and Pytko were permitted to enter Flowers' home, there was no unlawful entry by the robbers. The Court noted that since Baize was not permitted to enter, and entered unlawfully, and because Britt's case was tied to Baize, the charge was appropriate.

Britt's conviction was affirmed.

PENAL CODE – KRS 514 - THEFT

Hasan v. Com.
2010 WL 3361384 (Ky. App. 2010)

FACTS: On August 31, 2008, Hasan and his three young children (ages 7, 5 and 3) entered a Lexington Dillard's store. One child was carrying an empty, folded Macy's bag. They walked around and Hasan selected several clothing items, including two expensive suits. He went into a dressing room. When he emerged, he was carrying only one suit and his daughter was carrying the bag. A suspicious clerk checked the dressing room; he did not find the second suit. Hasan told his children to "go outside and wait" while he talked to another clerk. An off-duty officer, working security, observed Hasan hold the Macy's bag briefly before he handed it back. He saw Hasan either tell the children or "motioned for them to go outside."

Hasan then went outside, where the officer approached him. He resisted as the officer "handcuffed him, took control of the Macy's bag, and took Hasan and the children back" inside the store. Inside the bag the officer found 17 expensive ties, a polo shirt and a suit, totalling over $3200 in merchandise. There were no receipts in the bag.

Hasan stated that he was returning the polo shirt and some of the ties, and that he handed the suit to his daughter, who then placed it in the bag. He also stated he had become "frantic when he discovered his three-year-old son was missing." He stated he did not tell the children to go outside and that he "went after them" when he realized they'd done so.

Hasan was indicted for Theft by Unlawful Taking. He was convicted and appealed

ISSUE: Is a showing that a person is in possession of stolen goods sufficient to prove theft?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court agreed that the only issue was Hasan's intent. The Court noted there was evidence that he'd selected a number of items of clothing, that he'd gone into the dressing room, and that he emerged without the items. The items were subsequently found in the bag. Even if his testimony was believed, that explained only the polo shirt and some of the ties. "There was no explanation for how the additional eleven or twelve ties and the suit ended up inside the bag."

The Court found the jury's decision was reasonable and affirmed the conviction.

Gamble v. Com.
319 S.W.3d 375 (Ky. 2010)

FACTS: On February 7, 2007, Gamble went into a Lexington bank "with his head and face covered." The teller, Lindgren, pressed her silent alarm as the man approached her window. Dowdy, another bank employee, was nearby. Gamble passed Lindgren a note which indicated he had a gun, and he also told her that verbally. She never saw a gun, however, but did place money and a dye pack into a bag. Gamble's hands were always visible during the exchange.

Gamble was quickly captured and his aunt's consent to search their shared apartment was obtained. Police found cash, the bait money and dye-stained clothing, along with the torn up note. No gun was ever found.

Gamble admitted to robbing the bank, but stated he did not actually have a gun. He denied making any verbal statements as well. He was indicted and tried, and the jury instructed on both degrees of robbery. He was convicted of Robbery 1st and appealed.

ISSUE: Does a statement that one has a gun raise the offense to Robbery 1st?

HOLDING: Yes

DISCUSSION: The Court found that it was reasonable for the jury to conclude that "Gamble specifically referenced a gun, threatened to use it, and implied that he would have used it had Lindgren not cooperated." Although the Court agreed that the decision in Williams v. Com.[3] suggested otherwise, in that case, the suspect only implied the presence of a gun, while Gamble specifically stated he had a weapon.

The Court affirmed the conviction.

PENAL CODE - KRS 524 - INTIMIDATING A PARTICIPANT ….

Moreland v. Com.
322 S.W.3d 66 (Ky. 2010)

FACTS: On November, 23, 2001, S.C. was sexually assaulted. On January 23, 2002, C.C. was also sexually assaulted, in essentially the same manner. Finally, on March 1, 2004, K.P. was sexually assaulted in the same area.

Four years later, Moreland's mother sought an EPO against Moreland. She told the police that she thought he was responsible for the unsolved assaults. She gave consent for a search of the home she had shared "on and off for several years" with her son. They collected a toothbrush and obtained a DNA sample which matched the semen found on all three victims. They obtained a search warrant and obtained a buccal (cheek) swab for DNA from Moreland. That profile also matched that of the DNA found on the victims.

[3] 721 S.W.2d 710 (Ky. 1986).

Moreland was convicted of Burglary, Rape, Sodomy, Intimidating a Witness and Tampering with Physical Evidence. He appealed.

ISSUE: Must a person actually be a participant in a legal process in order for a threat to be sustained as Intimidating?

HOLDING: Yes

DISCUSSION: Moreland first argued that the charge of Intimidating a Participant was inappropriate. The Court noted that all three victims were threatened "to the effect that he would kill them if they called police." Moreland argued that the threats were "made to effectuate the sexual assaults and, therefore, could not sustain an independent intimidating charge. Further, there were "no legal proceedings in existence at the time the threats were made."

The Court noted that the statute in question was amended between the second and the third crime. Prior to 2002, it was enough that the accused believe the individual may be called as a witness, "regardless of whether actual proceedings had been initiated or the defendant's knowledge of those proceedings." The current version, however, requires that the person actually be a participant in the legal process "at the time the offense is committed." The instructions were thus faulty with respect to the first two victims. As such, Moreland was entitled to acquittal on all three charges of Intimidating a Participant.

The Court affirmed the remaining convictions for unrelated arguments relating to the jury.

DUI

Steen v. Com.
318 S.W.3d 116 (Ky. App. 2010)

FACTS: On May 4, 2007, Steen gave Lyle a ride home from work in Jefferson County. "That ride ended abruptly and tragically" with Lyle dead and Steen badly injured. At the hospital, Steen's blood alcohol was tested. The first sample was taken about an hour and twenty-five minutes after the wreck, and the results were between .083 and .089. A second test by KSP was based on a sample taken 2 hours and ten minutes after the wreck, with a result of .07.

The Medical Examiner extrapolated, using three different methods, what she believed Steen's BA was at the time of the collision, finding it to be somewhere between .10 and .11. She acknowledged that the calculations do not reflect the possibility that he ingested the alcohol just prior to the wreck and continued to absorb it afterwards, but that it was the best she could do because they didn't have a more timely sample.

Steen was charged, and ultimately convicted, of Manslaughter. He appealed.

ISSUE: Is the actual level of intoxication critical for a charge under the wanton state of mind?

HOLDING: No

DISCUSSION: The Court found that despite the ME's ability to be more specific, that there was sufficient evidence to support a conviction for wanton conduct. Further, the Court noted, the "per se level of intoxication is not to be introduced in any case outside a prosecution for driving under the influence."[4] The Court noted that "there is no magic number for intoxication, the jury must determine based upon the facts and circumstances of the case if the driver was 'under the influence' sufficiently to have constituted wanton conduct."[5]

Steen's conviction for Manslaughter 2nd was affirmed.

Craig v. Com.
2010 WL 2976898 (Ky. App. 2010)

FACTS: On the day in question, Sgt Sumner (unidentified Christian County agency) saw a car pull out of a driveway and stop abruptly. He followed it and saw that it had improper tags. As the car circled the block, he activated his lights and siren – the car then pulled back into the driveway it had exited. Sgt. Sumner saw Craig get out of the driver's side and Melcher from the passenger's side – Melcher was holding a beer.

"Craig failed several field sobriety tests, and while in custody, blew a .089 on the breathalyzer." He was charged with several offenses, including DUI – 4th offense. At trial, Melcher testified he had been driving and that they had actually both gotten out of the driver's side door since the passenger door did not open from the inside.

Craig was convicted and appealed.

ISSUE: Is a witness statement sufficient to prove operation of a vehicle for DUI?

HOLDING: Yes

DISCUSSION: Craig claimed that the prosecution failed to prove beyond a reasonable doubt that he was operating the vehicle. Sgt. Sumner, however, had testified that he "recognized Craig behind the wheel of the car and saw him exiting the driver's side of the car." He also stated that "though Melcher initially said he was driving the car, Melcher later told Sgt. Sumner he only said that in order to keep Craig out of trouble." The evidence was before the jury, which was free to believe which side it wished to believe.

Craig's conviction was affirmed.

[4] Cormney v. Com., 943 S.W.2d 629 (Ky. 1996); Walden v. Com., 805 S.W.2d 102 (Ky. 1991).
[5] Overstreet v. Com., 522 S.W.2d 178 (Ky. 1975).

DOMESTIC VIOLENCE / FAMILY ISSUES

Weckman v. Weckman
2010 WL 2696482 (Ky. App. 2010)

FACTS: On August 25, 2009, Kira Weckman requested an EPO against her husband, Keegan Weckman. The allegations concerned events that had occurred several weeks previously, in North Carolina. Keegan disputed most of what Kira said at the hearing and brought in a statement from a neighbor that a gun that Kira alleged was brandished during the incident had actually been in the neighbor's possession during the time in question. He gave a different version of what had occurred, stating that Kira was mentally ill and that he had gone to her parents' home, where she was staying, to tell her that he wanted a divorce – and that this precipitated the EPO.

At the conclusion of his testimony, the Court asked a few question and questioned why Kira would have a motive to lie in the petition. The Court refused to allow Keegan's father to testify. It then entered the DVO against Keegan, who appealed.

ISSUE: May a judge give preference to one party in a DVO hearing?

HOLDING: No

DISCUSSION: The Court reviewed the statute and noted that a DVO is only permitted if the petitioner proves by a preponderance that acts of violence occurred and "may again occur." The Court agreed that "DVO hearings must grant both parties equal footing from which to state their case" and that there is "no presumption that the petition is true or that the petitioner is truthful." The Court noted that the "family court appeared to disregard the above standard when repeatedly questioning Keegan about Kira's motivation to lie." The Court found the "court's tone and line of questioning … improper."

Further, the Court found that "although DVO hearings are civil proceedings, the significant consequences trigger procedural protections." As such, "those subject to a DVO are entitled to due process rights, such as the right to call witnesses and a full evidentiary hearing." The Court denied Keegan that right by "interrupting the proceeding and making a premature judgment." The Court agreed that it was improper to deny Keegan the right to have his father testify, as his father was a witness to the couple's "last interaction" and his testimony was "relevant to the imminent harm inquiry." He was also expected to testify to "advance the defense theory that Kira sought a DVO in an attempt to ruin Keegan's career, which clearly relates to credibility."

Finally, the Court agreed that the family "court unnecessarily limited Keegan's testimony concerning Kira's mental bipolar disorder." The Court found nothing in the record that the issue was brought up to attack Kira, and the court found that "mental health disorders and medication schedules can be highly relevant to credibility."

The Court noted that although the "domestic violence statutes should be construed liberally in favor of protecting victims from domestic violence," that "the issuance of a DVO must not be taken lightly." "While the orders provide protection to victims, they often have devastating effects on

those to whom they are issued against" and it "is essential that courts embrace the gravity of this decision."

The Court vacated the DVO and remanded the case back for further proceedings.

Wilkins v. Lawson
2010 WL 3270227 (Ky. App. 2010)

FACTS: On December 17, 2009, Lawson asked for a DVO on behalf of her daughter, age 13, against the child's stepmother, Wilkins. She alleged that the child was afraid to go to the house (her father had custody) and was afraid of her stepmother because she had struck her and threatened her with a knife. An EPO was entered. At the DVO hearing, Lawson, Wilkins and two social workers testified, but apparently not the daughter. Lawson "had not witnessed any of the above-described incidents and provided no information about any acts of abuse that occurred in her presence."

The court entered the DVO against Wilkins and gave temporary custody of the child to the Cabinet. Wilkins appealed.

ISSUE: Is hearsay admissible in a DVO hearing?

HOLDING: No

DISCUSSION: The Court noted that a "DVO petition is subject to the same hearsay evidentiary standards as other forms of evidence."[6] The Court noted that all of the evidence against Wilkins was in the form of hearsay. Nothing in the admissible evidence before the Court gave any reason to believe that there was any "sense of immediacy or present danger." Further, the "articulated abuse remains inchoate and unsupported."

The court found that the Family Court lacked "substantial evidence of physical injury, serious or otherwise, sexual abuse, assault, or the infliction of fear of any of the foregoing." The DVO was vacated and set aside.

T.W./C.W. v. Cabinet for Health and Family Services
2010 WL 3292905 (Ky. App. 2010)

FACTS: T.W. and C.W. were charged, in Gallatin County, with neglect of their infant child. At a bench trial, the proof indicated they had been involved in cultivating marijuana and that T.W. was arrested on July 23, 2009. C.W. was under the influence at the time and was asked to turn the child over to a relative, she complied. She admitted the next day to smoking marijuana and taking Valium not prescribed to her, and caring for the child subsequent to that. She stated her husband also smoked marijuana and then cared for the child. Specifically, no problems were noted with the condition of the home.

[6] Dawson v. Com., 867 S.W.2d 493 (Ky. App. 1993)

Following the arrest, both parents agreed to a "prevention plan" in which they would not smoke marijuana or take unprescribed medications. At the bench trial, the social worker testified that they were able to care of the child and that she was only concerned about the drug use. The court found their drug use to be a "threat and harm" to the child and found neglect. Both T.W. and C.W. appealed.

ISSUE: Does parental drug abuse constitute neglect?

HOLDING: Yes

DISCUSSION: The court looked to the definition of neglect, KRS 600.020, and concluded that the facts fit the definition. The Court agreed that it was reasonable for the Family Court to find the child was at risk of physical or emotional injury.

The Family Court decision was sustained.

Ball v. Ball
2010 WL 3292955 (Ky. App. 2010)

FACTS: On July 8, 2009, Stacey Ball filed for an EPO against her husband, Steven, two days after he filed for divorce. An altercation apparently occurred that night. She requested temporary custody of the minor children. The Nicholas Family Court determined that the incident "was not an instance of domestic violence" as defined by KRS 403.720 and dismissed the petition, but later did issue a "joint and mutual restraining order" prohibiting contact except as it related to exchanging the children.

On November 9, 2009, the children became ill while with Steven. He called Stacey and asked if she wanted him to take them to the doctor, or if she wanted to take them after she picked up the children a few hours hence. She decided she would take them and asked Steven to bring the children to her mother's home in Paris. He did so, in the company of his mother. There, apparently, an argument ensued between the couple and their respective mothers – and terminated in a statement by Steve that Stacey perceived as a threat. Officer Buckley (unknown agency) who had responded to the July altercation, testified that both bore marks of a physical altercation at that time but that neither wanted to press charges. Steve had agreed to leave the house and did so.

On January 21, 2010, the case went before the Bourbon County Family Court, which entered a DVO against Steve. He appealed the issuance of the DVO.

ISSUE: Must violence be involved for a DVO?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court noted that the incident used to support the DVO "simply did not involve violence." There was no indication the situation was anything more than verbal. The July incident was determined immediately after the fact, by another court, not to have been an instance of domestic violence.

The court concluded that the issuance of the DVO was unsupported by evidence and inappropriate. The Court reversed the DVO.

SEARCH & SEIZURE - SEARCH WARRANT

Bunch v. Com.
2009 WL 960784 (Ky. App. 2009)

FACTS: On Nov. 13, 2006, Marshall County officers executed a search warrant at Scholar's home. They found Bunch and Childress in a camper on the property, but the camper wasn't included in the areas permitted under the search warrant. Bunch and Childress entered the camper while the search was ongoing. Officer Mighell knocked and identified himself. Childress answered the door and he was told the detective had an outstanding warrant for his arrest. "From the doorway, the detective saw a piece of tin foil in a trashcan that was folded in a manner consistent with the use of methamphetamine" - he later described it as a "meth bowl." Det. Mighell heard a noise in the bathroom and told the occupant to come out - Bunch did so. He read Miranda warnings to both and asked for consent to search the trailer - it was denied.

Bunch was detained for 9 hours, prior to the officers obtaining a warrant and searching the camper. They seized a number of items in the camper and the automobile.

Bunch was indicted and moved for suppression. When that was denied, she took a conditional guilty plea and appealed.

ISSUE: Does a lengthy pre-search detention invalidate a subsequent warrant?

HOLDING: No

DISCUSSION: Bunch argued that her lengthy detention preceding the search warrant required the suppression of the evidence found as a result of the search warrant. The Court noted that no explanation was provided to justify "Bunch's prolonged detention," and that it was "left to conclude that the nine-hour detention constituted an improper de facto arrest." Even so, the Court found that the search itself was appropriate and the "detention was completely independent of the search and the items seized." Her detention had no effect on what was found during the execution of the warrant.

The Court upheld Bunch's plea.

Hollan v. Com.
2010 WL 4025790 (Ky. App. 2010)

FACTS: On September 20, 2004, Smith walked into the Breathitt County Sheriff's Office and told Deputy Turner "that he knew someone who was selling Oxycontin." Smith had not been an informant before. Turner gave Smith $120 in marked bills and a tape recorder in order to make a buy. He searched Smith's person but not the car. Smith drove to Hollan's residence, with Turner

following, and made a buy. After Smith left, they drove to a previously agreed upon location and Turner turned over two Oxycontin pills and the recorder. Turner did not search Smith or his car.

Turner got a warrant, which stated that "(1) a confidential informant said Hollan was selling Oxycontin from his residence, and (2) Turner and the informant went to Hollan's residence where the informant bought two Oxycontin pills for $120 as the deputy was watching said transaction." "A search of Hollan's home revealed a number of pills, a small bag of marijuana, a pill cutter, and two small insulin syringes."

Hollan was indicted and moved to suppress. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is it necessary to substantiate information for a warrant provided by an unproven informant?

HOLDING: Yes

DISCUSSON: Hollan argued "that Smith's reliability as an informant was unknown and uncorroborated, and that accordingly, the warrant based upon the information he provided was defective." He asserted "that Turner failed to ensure credibility by failing to search Smith's car either before or after the transaction, and failing to search Smith himself after he came back from Hollan's house." In addition, the deputy did not actually witness the transaction, and if that was redacted, the warrant did not satisfy probable cause.

> The Court noted that "that the test for sufficiency of an affidavit underlying a search warrant is a totality of the circumstances test, namely, whether given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."[7] It must also "establish a substantial basis for concluding that the contraband or evidence described will be found in the place to be searched."[8]

In this case, with an "informant whose reliability was unknown, and whose veracity had not been previously established," the "'controls' on the buy itself are of particular importance." Had the audiotape been usable, or the searches made, the situation might have been different. As such, "everything collected pursuant to the warrant should be suppressed."

The Court found that the visual inspection and identification of pills not otherwise subjected to testing by the technician was sufficient and relevant. The Court, however, agreed that it was error to attempt to use an audiotape that was almost entirely inaudible and supported little of evidentiary value.

Hollan's conviction was reversed.

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[7] Illinois v. Gates, 462 U.S. 213 (1983).
[8] Com. v. Hubble, 730 S.W.2d 532 (Ky. App. 1987).

SEARCH & SEIZURE - CONSENT

Cruces v. Com.
2010 WL 2788193 (Ky. App. 2010)

FACTS: On October 18, 2008, Lexington police responded to a complaint that E.L., a 15 year old girl, had run away and was at the home of Cruces, her "adult boyfriend." Two officers, along with her mother, went to the apartment. They knocked and Cruces answered. Cruces spoke to E.L.'s mother in Spanish, and also gave Officer McMinoway "verbal consent in Spanish for the police to enter the apartment, as well as consent in broken English and via body language." Officer Holland, however, stated that Castille opened the door and gave consent. When the officers entered, they found "four hispanic (sic) males in the living room." Officer Holland asked for consent from Castille to search the bedroom, which he gave. E.L. was found in the bedroom.

Cruces was indicted for Rape and Sodomy 3rd. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: May a non-resident give a valid consent to enter a residence?

HOLDING: Yes

DISCUSSION: Cruces argued that "irrespective of whether Castille or Cruces allegedly gave consent to enter and search the apartment, the Commonwealth did not demonstrate that the individual giving consent had the apparent or actual authority to do so." The trial court had not given a specific ruling, but had "concluded that under the totality of the evidence, valid consent was given by one or both individuals." The Court noted that Castille supported Officer Holland's testimony, having given consent twice during the time the officers were present. The Court noted that Castille's two children were asleep in the bedroom where E.L. was found, "further bolstering the conclusion that he had actual or apparent authority to consent to the search of that area."

The Court agreed that under either McMinoway's or Cruces' testimony, the consent wa s valid. Cruces' plea was upheld.

SEARCH & SEIZURE - PLAIN VIEW

Jackson v. Com
2010 WL 3270090 (Ky. App. 2010)

FACTS; On December 1, 2007, Deputy Sheriffs Riddle and Wilson (McCracken County SO) did a "knock and talk" at Cole's home. It culminated with Cole's arrest and the seizure of several pounds of marijuana. Cole agreed to cooperate and telephoned Jackson to obtain more marijuana. Cole was taken back home and the transaction was arranged. When Jackson arrived, he was "stopped by police and an open duffel bag containing marijuana was observed in plain view inside his vehicle." He was arrested, indicted and ultimately convicted. He then appealed.

ISSUE: May contraband items be seized when in plain view?

HOLDING: Yes

DISCUSSION: The Court agreed that the information available to the officers was sufficient reasonable suspicion to support the initial stop for a preliminary drug investigation. Once they saw the marijuana in plain view, they had probable cause to search it under the automobile (Carroll) exemption. The trial court also found the search valid as a search incident to arrest. The Court agreed that "[a]lthough reasonable suspicion does not support the making of a valid arrest, it may provide police with the authority to detain a suspect if the intrusion to the suspect falls far short of the traditional intrusions associated with an arrest."[9] Further, despite Jackson's objection, the Court had has held that "merely handcuffing a suspect does not constitute an arrest or require more than reasonable suspicion if necessary for officer safety."[10]

The Court agreed that although Cole's reliability may not have been high initially, that it was properly corroborated by the officer's observation of the transaction. The Court agreed that "[a]lthough certain procedures may burden a person's freedom of movement, police have the authority to take any reasonably necessary step to "protect their personal safety and to maintain the status quo during the course of the stop."[11] The nature of the crime and the officer's knowledge of Jackson's prior history was sufficient to support the initial brief handcuffing.

With respect to the search, the Court found that the marijuana was in plain view. "[u]nder the plain view exception to the warrant requirement, police may seize evidence if the evidence is immediately incriminating, they were in a lawful place when they saw the evidence, and they have a lawful right of access to the object itself."[12]

After addressing a number of other claimed errors, the Court upheld Jackson's conviction.

SEARCH & SEIZURE – SEARCH INCIDENT TO ARREST

Com. v. Marshall
319 S.W.3d 352 (Ky. 2010)

FACTS: On January 2, 2007, Marshall was stopped by Officer Schwartz (Lexington PD). The officer believed that Marshall was the subject of an outstanding warrant. Because he knew from prior contact that Marshall was usually armed, he elected to wait for backup, but when it arrived, he had lost sight of Marshall. While searching for him:

> … the officers encountered a frantic witness who informed them that [Marshall] was involved in a fracas inside a nearby apartment unit. As the officers approached the complex, Schwartz witnessed two women climbing out of the back window of the suspect apartment unit. The women stated that there was an altercation going on in the apartment and that they wanted to escape the situation.

[9] Dunaway v. New York, 442 U.S. 200 (1979).
[10] Radvansky v. City of Olmsted Falls, 395 F.3d 291 (6th Cir. 2005).
[11] U.S. v. Hensley, 469 U.S. 221 (1985).
[12] Hazel v. Com., 833 S.W.2d 831 (Ky. 1992).

> Schwartz and the other officers then proceeded to enter the apartment and could hear the confrontation upon arrival. As they proceeded through the apartment, Schwartz testified that he spotted [Marshall] toward the back of one of the rooms with his back-side partially turned toward Schwartz and with both hands down the front portion of his pants. All the while, another individual was yelling from inside the apartment "It's in his crotch-it's in his crotch!" Schwartz, fearing that he had just witnessed [Marshall] conceal a weapon in his groin area, placed [Marshall] in hand cuffs and performed a Terry frisk.
>
> On direct examination, Schwartz testified that while performing the Terry frisk he felt a hard, rock-like substance in [Marshall]'s groin area, and, based on his five years' experience as a police officer, determined it "to be possibly crack cocaine." (emphasis added) . In contrast, on cross-examination, Schwartz testified that upon feeling the golf ball sized object he "knew it to be crack cocaine based on all [his] experience with it." (emphasis added) . After hearing Schwartz's testimony, the trial court found that the officer immediately knew the item was contraband upon contact, that Schwartz did not manipulate the object when making his determination, or that that there was insufficient evidence to show that the officer could have mistaken the object for a part of [Marshall's] anatomy.

Based upon evidence found, Marshall was convicted of trafficking in a controlled substance and bail jumping. He requested suppression and was denied. He took a conditional guilty plea and appealed. The Court of Appeals reversed the order "concentrating on the officer's testimony that the object could 'possibly' be crack cocaine." The Commonwealth appealed.

ISSUE: May an invasive search be done in a relatively public location?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court began:

> Strip searches are not always appropriate and as noted above, even when "a person is validly arrested [or validly arrestable, that] does not mean that he is subject to any and all searches that the arresting officer may wish to conduct."[13]. The rule is specifically applicable to strip searches, as they are extremely invasive and in fact will sometimes be totally improper, repugnant, and illegal.[14] Searches may not be conducted on the "mere chance that desired evidence might be obtained."[15] But there are situations where strip searches are necessary and particularly so where the officer has probable cause to specifically search such a

[13] U.S v. Mills, 472 F.2d 1231, 1234 (D .C . Cir. 1972) (en banc)

[14] See Stewart v. Lubbock County, 767 F.2d 153 (5th Cir.1985) (strip searches conducted without reasonable suspicion that minor offenders had possession of contraband are unreasonable and violate the Fourth Amendment) ; Taylor v. Com., 507 S.E .2d 661 (Va. App. 1998) ; see also Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir.1983) (strip searches prohibited where minor offenders are not inherently dangerous, are not being committed to a jail population but are merely being briefly detained, and officers have no reason to believe they are hiding weapons or contraband) .

[15] Schmerber v. California, 384 U.S . 757 (1966)) ; see also LaFave 8v Israel, Criminal Procedure § 3 .5(c), at 177 (2d ed. 1992) (routine strip searches cannot be "employed against all classes of arrestees") .

> private area to preserve or prevent the destruction of evidence or to discover a concealed weapon. Such were the facts surrounding our holding in Williams v. Com.[16], a decision based on events resembling those here.

In this case, the officers knew that Marshall was "actively selling drugs" and "tended to carry a weapon." Further, the Court noted that since Marshall placed it "in a location that makes the contraband immediately apparent to the plain feel of an officer's open hand, [Marshall] essentially positioned the contraband in what can be analogized as in 'plain view' of the officers."

Further, as soon as he identified the substance as crack cocaine, the officer had probable cause to arrest and do a full search. In effect, the Court stated that once he felt the cocaine, he could have made the arrest, and the fact that he did not actually make the arrest until he retrieved the cocaine was immaterial.

Marshall argued that the search, which took place in his apartment in a way that other occupants could have observed, was inappropriate. The court looked to the case of Bell v. Wolfish - and detailed the four factors used to balance the need for a particular search versus the personal rights potentially invaded.

> First, the court looked to the scope of the particular intrusion. A strip search is only less invasive than a physical exam, a chemical exam or a cavity search. However, simply because it was done in the field did not make it "per se prohibited." The Court did note that "officers should be cautious when performing these types of searches, outside of a sanitary and secure police station." In this case, the officers "faced a dangerous situation" and the circumstances warranted a visual search of Marshall's groin and buttocks. Next, the search was conducted by trained officers who had likely done it before, and there was probably embarrassment (mental pain) to Marshall. However, the Court repeated "simply because an individual chooses to hide contraband in an intimate location and does so making it immediately apparent to police, he may not then complain that the officers searched his person in an inappropriate manner absent other aggravating circumstances." (The Court noted in a footnote that it would have been better had the officers "simply closed the door completely.") The search involved "minimal trauma and pain." The Court did not "necessitate specialized training" - the only knowledge need is supplied by commons sense and decency. The officers testified that the no one was in the line of sight of the door. The Court found there was sufficient justification to initiate the more intrusive search. Finally, the Court looked to the last Bell factor and considered "the location in which the police conducted the search." The Court continued: "Of all the factors considered so far, we find this factor most troubling, yet ultimately conclude that it was reasonable under the circumstances." The Court, however, "recognize that strip searches are necessary for a plethora of reasons, and we understand that in order to preserve the safety of officers, of the public and of evidence, they must sometimes be employed . But we also take this opportunity, as did the United

[16] 147 S.W.3d 1 (Ky. 2004).

> States Supreme Court, to issue a caveat: these interests "hardly justify disrobing an arrestee on the street."[17] The court refused to suppress evidence based upon the unsupported assertion that the search was conducted in a manner potentially exposing Appellate to prospective onlookers. Where a search is conducted unnecessarily exposing an arrestee's naked body to the public, we will suppress absent the most extraordinary and bizarre circumstances-but conjecture without evidence will not be considered .

After applying the Bell factors, the Court concluded that the "need for the search outweighed the privacy considerations in this case." The Court of Appeals decision was reversed and the case remanded.

SEARCH & SEIZURE - TERRY

Brown v. Com.
2010 WL 3928151 (Ky. App. 2010)

FACTS: On August 1, 2008, Officer Dunn (Lexington PD) stopped a rental car driven by Robinson for turning without a signal. Brown was a passenger. Since, apparently, Robinson had only a learner's permit, Brown was asked for his OL and the rental agreement. As the radio was busy, Dunn did a search (apparently through her MDT) on the county jail website and learned both men had prior narcotics charges and Robinson had firearms charges. Based upon that information, she asked for a canine unit. Within a few minutes, she also had information that Robinson had an outstanding warrant. As she was confirming this information, Officer Stiltner arrived with his drug dog.

As Officer Dunn was informing Robinson that he was under arrest, the dog made a positive hit. However a search indicated no contraband or weapons in the passenger compartment. When they opened the trunk, the dog "lunged" toward it. They found two bags of cocaine wrapped in a shirt hidden in the spare tire area. At that point, Brown was also arrested.

Brown was indicted for Trafficking and requested suppression. When that was denied, Brown took a conditional guilty plea and appealed.

ISSUE: Is a minor traffic violation sufficient to support a traffic stop?

HOLDING: Yes

DISCUSSION: Brown argued that the vehicle was stopped improperly because "no traffic infraction occurred." The Court, however, concluded that his reasoning was faulty and that because, despite the fact that the street name continued, the street actually veered at a 45 degree angle to the left. As such, the Court found the stop lawful. Further, the Court discounted the fact that Officer Dunn listed the incorrect cross-street on her report, as her testimony was credible.

[17] Illinois v. Lafayette, 462 U.S. 640 (1983).

Finally, Brown argued that the officer lacked even a reasonable suspicion that they were involved in drug trafficking and that "the extended detention and use of the narcotics-detection dog exceeded the scope of the intrusion permitted by Terry." The court found the use of the dog to be appropriate and that once the dog made a hit, the search of the trunk was clearly justified and occurred while Brown "was being lawfully detained" pursuant to the original investigation.

Brown's plea was affirmed.

Barker v. Com.
2010 WL 2629584 (Ky App. 2010)

FACTS: On June 17, 2009, at about 3:30 a.m., Sgt Hudson (Madison County SD) was in a parking lot, speaking to an unrelated subject. He spotted a vehicle driving through another, nearby parking lot, without headlights. (However, the "parking lot was well-lighted.") The vehicle drove into an adjacent lot, and the deputy later testified "this was an unusual route for the public to take when leaving" that area. By the time it left the second lot, the headlights were on.

Sgt. Hudson elected to follow the vehicle and observed no "other traffic violations or suspicious behavior." He made a traffic stop and returned to his cruiser to check the OL provided by Barker. Corporal Eaves "directed his attention to a Pepsi can with burn residue in the console of the vehicle." Barker admitted to smoking marijuana but did not consent to a vehicle search. Sgt. Hudson arrested Barker for drug paraphernalia. Cocaine was found in the vehicle and more was found on Barker during the search incident to his arrest.

Barker moved for suppression, which was denied. He took a conditional guilty plea and then appealed.

ISSUE: May suspicious actions be used to support a Terry stop?

HOLDING: Yes

DISCUSSION: Barker argued that the traffic stop was not supported by sufficient evidence. The Court agreed that to justify a Terry stop of a vehicle, the "officer must be able to articulate more than a mere 'inchoate and unparticularized suspicion or hunch.'" The "objective justification" … "must be measured in light of the totality of the circumstances."[18] The Commonwealth argued that Barker's failure to use his headlights initially was sufficient basis for the stop, but he argued that he was not actually required to use the headlights in the parking lot. The Court noted that "if Barker had been charged with failure to illuminate his vehicle's headlights, then this issue would be relevant as a defense to the charge." But, he wasn't, so the proof wasn't necessary. The court agreed that "Barker simply being out late at night in a certain area of town would not be sufficient to raise a reasonable suspicion."[19]

The Court noted that "Sgt. Hudson also articulated other circumstances which raised additional circumstances." In particular, it addressed the Barker's unusual drive behind another building in

[18] U.S. v. Sokolow, 490 U.S. 1 (1989); Eldred v. Com., 906 S.W.2d 694 (Ky. 1996).
[19] Strange v. Com., 269 S.W.3d 847 (Ky. 2008).

exiting the parking lot. Although agreeing that the factors were "borderline," it noted that the "case aptly demonstrates the often-elusive distinction between a mere hunch and reasonable suspicion." The Court agreed that "the fact that certain conduct may be construed as consistent with innocent behavior does not mean that this conduct may not form the basis for reasonable suspicion." The court found the facts were sufficient to justify the initial stop of the vehicle.

Barker's plea was upheld.

SEARCH & SEIZURE - VEHICLE STOP

Cox v. Com.
2010 WL 3377752 (Ky. 2010)

FACTS: On June 15, 2008, Officer Lark (Radcliff PD) made a traffic stop of an illegally-stopped vehicle. Cox, the driver, was talking to two other men outside the car. Officer Lark obtained consent to search the car and found cocaine, a stun gun, a pistol and other items. He was charged and convicted of various offenses, and ultimately convicted. He then appealed.

ISSUE: May officers ask questions during a vehicle stop?

HOLDING: Yes

DISCUSSION: Cox argued that he gave consent for Officer Lark to search his person, but that he did not give consent for the car search. The Court, however, noted, that even if that was correct, when Cox stepped out of the vehicle, the cocaine was apparently in plain view.

He also argued that the officer's "questions about weapons and rugs exceeded the scope of the traffic stop, which was for the minor violation of being illegally stopped on a roadway." The Court, however, noted that asking such questions were permitted and do not "convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."[20]

The court found that the officer "did not unreasonably prolong the duration of the traffic stop with his questions" and as such, the "seizure remained lawful."

Cox's conviction was affirmed, although his sentence was vacated for unrelated reasons.

Hernandez v. Com.
2010 WL 2787926 (Ky. App. 2010)

FACTS; On April 20, 2008, Det. Ford (Lexington PD) was off duty when he observed a vehicle being driven erratically. He fell in behind the vehicle and called for on-duty officers to assist. The suspect made a "quick turn" into a hotel parking lot, got out and walked away from his vehicle. Det. Ford, watching, believed the subject knew he was being followed. Det. Ford called for K-9. He honked his horn and yelled "police." He caught up with the subject (Hernandez),

[20] Arizona v. Johnson, 129 S.Ct. 781 (2009).

showed his badge and requested OL. Hernandez shrugged his shoulders and it was clear he did not understand English. Ford switched to Spanish and made the request, to which Hernandez answered "no." He arrested Hernandez for not having an OL. Upon searching him, Ford also discovered "fraudulent immigration papers and a social security card in his wallet." Ford also discovered the vehicle's registration decal had been altered to appear current.

Hernandez was indicted for Criminal Possession of a Forged Document, Operating with an OL and Operating a vehicle without both headlights. Hernandez requested suppression, which was denied. Hernandez appealed.

ISSUE: Must a vehicle stop be made as soon as a violation is detected?

HOLDING: No

DISCUSSION: Hernandez argued that Ford lacked reasonable suspicion to stop him. He conceded that he only had one working taillight on the vehicle but contended that the "suspicion became stale when he was not immediately stopped for the violation" and further, that Ford, who was an undercover narcotics officers, "had an ulterior motive in stopping him" and that he was operating on a "'mere hunch' that he would find illegal drugs."

The court noted that Ford observed that the vehicle lacked two headlights, a violation of KRS 189.040. The fact that he waited a few minutes before making the stop was immaterial, as the court "believe[d] police always maintain the right to stop any person who is in breach of the law." Further, even if Ford had such an "ulterior motive," it was irrelevant provided there was a valid, albeit minor, violation of the law.

The Court agreed the "police did not exceed the scope of the reasonable suspicion provided by Hernandez's conduct. Once it was discovered that Hernandez did not have a valid OL, he was subject to arrest, and once arrested, the search incident was also appropriate.[21]

Hernandez's conviction was affirmed.

SEARCH AND SEIZURE – VEHICLE STOP - GANT

Rose v. Com.
322 S.W.3d 76 (Ky. 2010)

FACTS: On Nov. 19, 2003, Deputy Hardy (Estill County SO) went to Rose's home to arrest her on warrants for stolen checks. He passed a car driven by her ex-husband and recognized the passenger as Rose. He also saw her head "go down into the seat."

Deputy Hardy stopped the vehicle and found Rose no longer in the car. He noticed that the back seats had a gap between them and the trunk and surmised that she had managed to get into the

[21] McCloud v. Com., 286 S.W.3d 780 (Ky. 2009).

trunk. Her ex-husband admitted that to Deputy Hardy. He extracted Rose from the trunk and arrested her.

Mr. Rose consented to a search of the car and Hardy found a purse, a leather bag and a change purse. Inside he found stolen checks. Rose was charged with Possession of Stolen Mail Matter and criminal Possession of a Forged Instrument. Rose moved for suppression, which was granted. The Commonwealth appealed. The Court reversed the decision, finding the search lawful under New York v. Belton.[22] Rose appealed.

ISSUE: May a vehicle be searched following an arrest, if one of the two Gant exceptions are not present?

HOLDING: No

DISCUSSION: During the pendency of the appeal, the U.S. Supreme Court granted certiorari in Arizona v. Gant. In addition, the Kentucky Supreme Court had ruled in Henry v. Com., in which it concluded that the grounds for a Belton search were not met.[23] Following that decision, Arizona v. Gant[24] was decided, which redefined "the constitutional analysis surrounding the search of a vehicle incident to the arrest of a recent occupant." The Court continued – "this approach … directly contradicts our existing jurisprudence on the subject." Thus, we now find it necessary to bring the jurisprudence of this Commonwealth into compliance with that of our nation's highest court."

The Court reviewed the history of Belton and Gant, and noted that the Gant decision did find it "pertinent to note that when considering the constitutionality of a vehicle search incident to the arrest of a recent occupant, a court may find the search constitutional even where the arrestee is secured if 'it is reasonable to believe *evidence relevant to the crime of arrest might be found in the vehicle*."

In this situation, Rose was secured in the deputy's cruiser, so there was no possibility she could access the car to get a weapon or destroy evidence. As such, the search was unconstitutional and any case law that so conflicts was expressly overruled. With respect to the alternative justification, the Court was satisfied that Deputy Hardy did not have requisite suspicion that the vehicle harbored evidence related to the offense of arrest. He specifically testified "that he was *not* searching the vehicle in an attempt to locate evidence relating to the two warrants." As such, the search did not satisfy "constitutional muster under Gant's alternative analysis."

The order suppressing the evidence was reinstated.

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[22] 453 U.S. 454 (1981).
[23] 275 S.W.3d 194 (Ky. 2008).
[24] 129 S.Ct. 1710 (2008).

Com. v. Elliott
322 S.W.3d 106 (Ky. App. 2010)

FACTS: On March 15, 2009, Officer Lindsey (Russellville PD) "observed Elliott park his vehicle in an empty parking lot." He watched as "Elliott rummaged[d] through his vehicle" and then get out and "wander around the parking lot." Officer Lindsey made contact with Elliott and "detected a strong odor of alcohol." Upon learning that Elliott had Parkinson's disease, and "conscious of [his] disability," Officer Lindsey took him through a "select series of field sobriety tests." Elliott failed. The officer asked for consent to search the vehicle, which was initially provided, but as Lindsey went to the car, "Elliott suddenly withdrew his consent." However, before the withdrawal, the officer saw "a white powder substance on the middle console, driver's seat, and gear shift of the vehicle" and a "couple of torn clear plastic baggie corners lying on the seat."

Lindsey gave Elliott more field sobriety tests, and Elliott failed every one. He was arrested for DUI. Lindsey then searched the vehicle and found cocaine in a cigarette pack and drug paraphernalia in the console.

Elliott moved for suppression. Lindsey testified that he believed Elliott's impairment was due to more than just alcohol and that he believed the white powder was a controlled substance. Lab tests indicated Elliott had both alcohol and cocaine in his system.

The trial court rendered the following opinion:

> Concerning the search of the interior of the automobile, the question is whether the search is justified as a search incident to arrest. The court cannot find that the observation of the plastic corners on the seat created probable cause that drugs would be found elsewhere in the interior of the car under the automobile exception to the warrant requirement. Analysis of the facts of this case involves the recent case of Arizona v. Gant, decided on April 21, 2009. In this case, the United States Supreme Court reversed (the majority did not characterize it as a reversal – but that is what it was) the longstanding rule established in New York v. Belton, which allowed officers to search, incident to arrest, the interior of a vehicle where a recent occupant had been subject to arrest. Gant concluded that the safety and evidentiary justifications underlying the "search incident to arrest" rationale apply only when there is a reasonable possibility that the person under arrest might still gain access to the vehicle.
>
> The Gant Court recited that the purpose of the search-incident-to-arrest exception to the warrant requirement was 1) to protect officers from any weapons in the area, and 2) to safeguard any evidence of the offense of arrest. The Court reasoned that "if there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, *both* justifications for the search-incident-to-arrest exception are absent and the rule does not apply." Despite this clear statement in the dicta of the opinion, the holding of Gant states that police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest.

> This apparent conflict leaves open for legitimate argument whether the search-incident-to-arrest exception still applies where the arrestee no longer has access to the area to be searched but it is still "reasonable to believe" evidence might be found in the area. In interpreting Gant, this Court will presume that the holding was intended to be consistent with the stated reasoning of the opinion. The holding is thus interpreted to mean that where the arrestee no longer has access to the area to be searched, the search-incident-to-arrest exception no longer applies.
>
> In this case the search took place after Elliott was arrested and handcuffed in the back of the police cruiser. Under Gant, the search-incident-to-arrest exception cannot apply. This warrantless search must be found unreasonable and the evidence must be suppressed. It is recognized that the rules of search and seizure were changed and that the officer in fact acted reasonably in following what appeared to be the law at the time.

Following that opinion, the Commonwealth asked for reconsideration, pointing out that Officer Lindsey observed the powder and other items that were in plain view, and that gave him "probable cause to search the vehicle for cocaine under the plain view exception" and that it was "not required to defend the search as a search incident the arrest, and therefore Gant is not implicated." The trial court then decided not to exclude the visible evidence, but did continue to suppress the cocaine found in the search.

The Commonwealth appealed.

ISSUE: Is a vehicle exception (Carroll) search an exception to a Gant prohibition of a vehicle search?

HOLDING: Yes

DISCUSSION: The Court began:

> In Gant, the United States Supreme Court determined the scope of the so-called "search-incident-to-arrest" rule. This rule is really an exception. It is an exception to the well-settled constitutional tenet that "all searches without a warrant are unreasonable . . . . "[25]
>
> In applying Gant, the Kentucky Supreme Court has directed as follows:
>
> The [United States] Supreme Court previously afforded officers virtual carte blanche to search an automobile incident to the arrest of a recent occupant of a vehicle, holding that "[o]nce an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment."[26] This carte blanche has been greatly reduced by Gant, however. According to the new, far

[25] Cook v. Com., 826 S.W.2d 329 (Ky. 1992)).
[26] Thornton v. U.S., 541 U.S. 615 (2004).

> more restrictive rule expressed in Gant, "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest."
>
> The Gant Court explained that permitting officers to search the vehicle of an arrestee occupant without a warrant in circumstances where it is reasonable to believe that the vehicle contains evidence of the offense of arrest is necessary and legitimate due to "circumstances unique to the vehicle context[.]" These circumstances include "the ready mobility of automobiles as well as the reduced expectation of privacy [one has] in an automobile, owing to its pervasive regulation."[27] Accordingly, we agree with the Commonwealth that the trial court erred as a matter of law in ruling that the search-incident-to-arrest exception to the warrant requirement was not available unless the arrestee is within reaching distance of the passenger compartment of the automobile. A reasonable reading of Gant, as set forth by our Supreme Court in Owens, clearly holds that the exception is also available if it is reasonable to believe the vehicle contains evidence of the offense of arrest.

The Commonwealth also argued that the search was permitted under the "automobile" exception to the warrant requirement.[28] The Court agreed with the trial court that Officer Lindsey "acted reasonably" but went on to say that "this evidence compels a conclusion that Officer Lindsey had probable cause to believe that contraband was present in the vehicle."[29]

As such, the court found the trial court's ultimate decision to be in error, and reversed the order suppressing the additional cocaine and paraphernalia that was not in plain view at the time of the initial stop. Specifically, the court held that the search "was lawful under both the revised ' search-incident-to-arrest' exception set forth in Gant and the 'automobile' exception."

SUSPECT ID - SHOWUPS

Petro v. Com.
2010 WL 3292949 (Ky. App. 2010)

FACTS: On February 4, 2008, Wilson was working at a job site close to Neal's home. He noticed someone hooking up a trailer at Neal's home, to a red Ford Ranger pickup truck. He yelled at the individual and the individual looked back at him. Wilson watched for a few moments, from about 30-35 feet away. The individual drove away.

About an hour later, Bridgeman, Wilson's employer, returned to the site. Wilson described the individual and Bridgeman called Neal. Neal stated he'd given no one permission to take the trailer. Neal filed a police report with Clinton County Sheriff Riddle. Riddle spoke to Bridgeman but did not speak to Wilson or otherwise document the conversation. Bridgeman's description of the truck was

[27] Dunn v. Com., 199 S.W.3d 775 (Ky. App. 2006) (citing Pennsylvania v. Labron, 518 U.S. 938 (1996)).
[28] Morton v. Com., 232 S.W.3d 566 (Ky. App. 2007).
[29] McCloud v. Com., 279 S.W.3d 162 (Ky. App. 2007).

apparently inaccurate, as he reportedly stated it was white with a blue stripe. There was no indication that Sheriff Riddle was given the physical description of the suspect.

Four days later, coincidentally, an accident occurred nearby involving a white truck with a blue stripe. Sheriff Riddle called Wilson to the scene, who, for unknown reasons, agreed it was the suspect vehicle. Sheriff Riddle took Wilson to the hospital to identify the injured driver, Petro. Petro was identified by Wilson. He was charged and indicted for theft. Petro moved to suppress the ID, but that was denied. He was convicted and appealed.

ISSUE: Must a showup be done close in time to the actual crime?

HOLDING: Yes

DISCUSSION: The Court began by nothing that "show ups are inherently suspect and 'should be accepted with caution.'"[30] However, they are "helpful when used immediately after the crime to establish probable cause or to clear a suspect."[31] The Court agreed that in this situation, since no other description was recorded, there was no accuracy of the prior description to compare to Petro.

Further, the Court noted, and "most importantly, four days had passed before the show up identification took place." There was no other evidence connecting Petro to the crime and "the record offers no explanation for why a regular lineup of suspects was not used in this case."

Petro's conviction was reversed.

INTERROGATION – CUSTODY

Mundy v. Com.
2010 WL 3377751 (Ky. 2010)

FACTS: In 2008, C.M. reported that her stepfather, Mundy, had sexually abused her for 8 years - she was then 16. The investigating agency (in Hancock County) was able to record a telephone conversation between the two about the alleged abuse. Following that, Det. Whitaker asked Mundy to come to the station. The detective later testified that he told Mundy that he was not in custody and Mundy drove himself to the station.

Mundy claimed that the configuration of the seating in the interview room made him feel that he was not free to leave, as the detective sat in such a way as to effectively block him in the room. Following the interview, he was permitted to leave and drove himself home.

Ultimately Mundy was convicted of multiple sexual offenses. He then appealed.

ISSUE: Is an interrogation at a police station always custodial?

HOLDING: No

[30] Myers v. Com., 499 S.W.2d 277 (Ky. 1973).
[31] Savage v. Com., 920 S.W.2d 512 (Ky. 1996).

DISCUSSION: Among other issues, Mundy argued "that a reasonable person in his situation would have believed he was in custody." The Court noted there was a disputed statement, allegedly by the detective, to the effect that "if you cannot come down here, I will come over and get you." Even if he did say it, the court found that to be "not inherently coercive." It could have also been a reference to Mundy's inability to drive himself to the station, and that "detective could simply have meant that he was willing to provide a ride if [Mundy] could not drive himself to the police station." Further, Mundy was permitted to choose his own seat. "The only fact weighing in favor of finding custody in this case was the detective's decision to sit in a position blocking the exit from the interrogation room. The configuration of the seating, along with the fact that [Mundy] was allowed to choose where he sat, alleviates this concern sufficiently for this Court to able to say that [Mundy] was not in custody."

The Court also agreed that it was not double jeopardy to convict of both Rape and Incest arising out of one sexual assault.

Mundy's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - RIGHT TO SILENCE

Carlisle v. Com.
316 S.W.3d 892 (Ky. App. 2010)

FACTS: On November 6, 2007, Det. Trimborn (unidentified Henderson County area officer) "confronted Carlisle at his grandmother's home regarding allegations he had raped his stepdaughter." He was taken to the station by Det. Trimborn, and there was provided with a written copy of Miranda. Trimborn questioned Carlisle regarding the allegations. "For approximately an hour and a half, Carlisle wholly denied the rape and maintained his innocence despite Detective Trimborn's insistence that he admit to raping his stepdaughter so he could 'help [him]self.'"

Since this case turned on how the law was applied to the circumstances, the opinion included the following transcript:

> Carlisle: Well, Brian, I don't want to say no more, okay?
> Det. Trimborn: Let me talk to my sergeant for a second.
> Hang tight. I don't want you to mess yourself up. Just think about it for a few minutes, okay? I'm going to let you sit here and think for a few minutes. I don't know what to tell you, other than you need to help yourself. You really need to help yourself.
> Carlisle: Am I under arrest?
> Det. Trimborn: I said no. It's as clear as I can be, I said no. Sit here for a few minutes[;] let me talk to my sergeant[.] I'll be right back. Just think about it.
> Carlisle: Can I walk outside and smoke a cigarette?
> Det. Trimborn: No, you can't smoke a cigarette. Just hang on tight.
> Detective Trimborn then left the room.

Carlisle was alone for approximately six-and-one-half minutes when Officer Bradley Newman entered. Carlisle was apparently acquainted with Officer Newman. He did not give new *Miranda* warnings to Carlisle at any point in the conversation during which the following exchange occurred:
Off. Newman: What's up, [Carlisle]?
Carlisle: What ya say, Bradley?
Off. Newman: What are you doing, man?
Carlisle: Oh, I don't know, man.
Off. Newman: What the hell's going on?
Carlisle: You a sergeant now?
Off. Newman: No. No. What the hell's going on, brother?
Carlisle: Well . . . I'd rather not say. Of course, you probably already know.
Off. Newman: Know a little bit about it.
Carlisle: Bad situation, [Newman]. Real bad situation.
Off. Newman: Well, what, what, tell me what, what happened, I mean . . . or what it's really about[.] I'm just hearing hallway talk right now.
Carlisle: My, my daughter said that I raped her.
Off. Newman: How did you supposedly rape her?
Carlisle: I don't know, I don't know what she's saying. That's just all I know. This detective, [Trimborn], come in here and told me a bunch of stuff, I mean –
Off. Newman: What'd he tell you?
Carlisle: Just told me about what, about hit and miss what, what she said. Now, I don't, I can't really remember right now because I'm in a sto-, uh, state of confusion.
Off. Newman: You work today?
Carlisle: No.
Off. Newman: No?
Carlisle: But I'm supposed to go in tomorrow.
Off. Newman: When'd all this sh** supposedly happen?
Carlisle: Not last, not last night, night before last. The night that I was supposed to have went to work, Sunday night.
Off. Newman: Now, how would, how would you have raped her? I mean, I don't, I mean, did you hold her down and do something?
Carlisle: Didn't do nothing.
Off. Newman: Well, they sure got you in a pickle right now. You're looking at a long time. And you know I ain't going to bullsh** you. I mean, you're looking at a long time, L.D. [Carlisle]. Now, I don't know what I can do to help you.
Carlisle: Am I under arrest, Brad?
Off. Newman: Not yet. No. I'm not saying they're not going to, I'm not going to say that they're not going to lock you up, because I don't know. This ain't got nothing to do with me. I work street crimes, not this. I'm back here, but I don't work stuff like this. But I just come back here to see if there was anything I could do to help you. Because I know, brother, that you don't want to be gone a long time.
At this point, Carlisle asserted his right to consult with an attorney.
Carlisle: I'd rather talk to a lawyer.
Off. Newman: You want to talk to a lawyer?
Carlisle: Yeah.

Off. Newman: So you don't want to answer any more of his questions or anything?
Carlisle: I'd rather not.
Off. Newman: Well, that's your right, man. That's your right. I'll go get with him and see what he wants to do with you, okay? But if there's anything you wanted to tell me, I could see what I could do to help you. But if you just want to talk to an attorney, I'll go ahead and . . . have at it. I'm not going to be able to help you now.
Carlisle: Huh?
Off. Newman: I'm not going to be able to help you in any way now, man. I mean, I've got a good, you know, I work with these guys.
Carlisle: Just, just, just on somebody's word they can – .. . ?
Off. Newman: Every day, every day, man. Every day. That's what we do. I mean, that's where we go[.] [Y]ou've got somebody that says, so and so said they was going to kill me. Well, guess, what, we gotta do a report on it.
Carlisle: I don't understand that.
Off. Newman: I don't understand it half the damn time, but . . .
Carlisle: Am I free to go?
Off. Newman: Not until he comes back in here. Like I said, I don't know what their intentions are, but I might have been able to help you a little bit, but if you're just, if you don't want to talk to me, I can't, I can't make you talk to me . . . [Pause] . . . you want me to just go get him? You don't want me to try to help you?
Carlisle: I really appreciate it, man, but –
Off. Newman: I tried, man.
Carlisle: What can I say?
Off. Newman: All right.
Officer Newman then left the room.
Soon thereafter, Detective Trimborn and Officer Newman re-entered with paperwork and informed Carlisle he was under arrest. The interrogation continued as follows:
Det. Trimborn: Okay, Lann [Carlisle], I just got off the phone with the prosecutor. You're under arrest. We're going to charge you with rape.
Detective Trimborn then addressed Officer Newman, still in Carlisle's presence.
Det. Trimborn: The prosecutor told me, Brad [Officer Newman], that when I get done with this paperwork, if he ain't said a word to try to help himself, then there will be no deals cut whatsoever. He will give him the maximum sentence in prison as a rapist. Basically, he's calling Lann's [Carlisle's] bluff.
Carlisle: What? So I will be under arrest, right?
Det. Trimborn: You are under arrest. What's your middle initial?
Carlisle: D, for Darrell.
[Trimborn then proceeds to fill out paperwork.]
Det. Trimborn: What is rape, third?
Carlisle: Can we step outside for a few minutes?
Det. Trimborn: Who's that?
Carlisle: Can me and you step outside for a few minutes?
Detective Trimborn agreed to Carlisle's request and the two left the room. The conversation that next took place was not recorded; however, the circuit court concluded Carlisle confessed to committing the rape and that Trimborn neither questioned nor threatened the suspect. Upon reentering the police station,

> Carlisle Detective Trimborn testified at the suppression hearing that he asked Carlisle no questions outside; instead, he claims Carlisle simply stated, "Brian, you're right. I did it." Subsequently, the detective says he advised Carlisle that while Carlisle was free to make a statement, Trimborn could not ask questions because Carlisle had invoked his right to have an attorney present. Trimborn did not claim to re-state the full Miranda warning. The detective testified Carlisle then proceeded to give a detailed account of the rape. confessed to raping his stepdaughter and gave a fairly detailed description of the offense.

Carlisle was indicted on charges of Rape 1st. He moved for suppression of the evidence. The Court denied the motion. Carlisle took an Alford[32] conditional plea and appealed.

ISSUE: Must an invocation to a right to silence be scrupulously honored?

HOLDING: Yes

DISCUSSION: The Court began: "Once a suspect in custody has invoked his right to remain silent, the interrogation must cease."[33] Statements made after "invocation are admissible provided the authorities have 'scrupulously honored' the defendant's right to remain silent."[34]

> The factors identified in Michigan v. Mosley which determine whether interrogating officers have, in fact, scrupulously honored a suspect's rights are: (1) whether the defendant was advised of his Miranda rights prior to the initial interrogation; (2) whether the detective conducting the interrogation "immediately ceased questioning [the suspect] after he invoked his right to remain silent and did not resume questioning or try to persuade [him] to reconsider his decision"; (3) the differences between the circumstances of the original and any subsequent interrogation, *e.g.*, whether the later questioning was about a different offense, after significant time had passed, in a different location, and/or conducted by a different officer; and (4) whether the suspect was re-read the Miranda warnings prior to the subsequent interrogation.[35] Application of these factors to the case *sub judice* reveals that Carlisle's right to remain silent was not scrupulously honored.

The Court continued:

> The officers' questioning of Carlisle can be viewed as three separate interrogations or three phases of the same interrogation. The first occurred when Detective Trimborn escorted Carlisle to the police station and initiated the questioning. The detective properly issued Miranda warnings prior to asking the suspect any questions and ensured he understood them. However, although Detective Trimborn asked no further questions after Carlisle invoked his right to

[32] North Carolina v. Alford, 400 U.S. 25 (1970).
[33] Edwards v. Arizona, 451 U.S. 477 (1981).
[34] Michigan v. Mosley, 423 U.S. 96 (1975).
[35] Mills v. Com., 996 S.W.2d 473 (Ky. 1999).

> remain silent (*i.e.*, when he said, "I don't want to say no more[.]"), the detective continued his attempts at persuading Carlisle to confess. By telling Carlisle, "I don't want you to mess yourself up[,]" and encouraging him to "think about" his decision to remain silent because he needed to "help [him]self," Detective Trimborn was continuing his effort to have Carlisle waive the right to remain silent, or to confess in spite of it. This was improper.

The second interview also raised concern because Carlisle was questioned only a few minutes later, about six minutes, "again about the same offense in the same location, without re-informing him of his Miranda rights." The second officer also "tried to convince Carlisle to waive his right to remain silent, suggesting Newman could offer help only if Carlisle did so."

> A third contact was made while the officers were completing arrest paperwork. "The conversation between the police officers conveyed the prosecutor's position that if Carlisle "ain't said a word to try to help himself, then there will be no deals cut whatsoever." It was certainly meant for Carlisle's hearing and clearly designed to put pressure on the suspect to relinquish his right to remain silent. The detective's comment was effectively an ultimatum: either Carlisle would confess before Detective Trimborn finished the paperwork, or the prosecutor would "give him the maximum sentence in prison as a rapist." Additionally, and again, Detective Trimborn did not remind Carlisle of his right to remain silent upon re-entering the interrogation room, when stepping outside to permit Carlisle to smoke a cigarette, or when later recording Carlisle's confession following the smoke break."

The Court concluded that "Given the officers' repeated failure to comply with the requirements of Miranda and Mosley, it is clear they engaged in a pattern of behavior designed to deprive Carlisle of his right to remain silent." The Court reversed the denial of the motion to suppression and remanded the case for further proceedings.

TRIAL PROCEDURE / EVIDENCE - CONSTRUCTIVE POSSESSION

McNew v. Com.
2010 WL 2629505 (Ky. App. 2010)

FACTS: On February 29, 2008 KSP got a tip of a methamphetamine lab at Witt's home in Jackson County. Trooper Morris, along with Jackson County deputies, discovered an "active meth lab" inside the house. They found Witt, his infant daughter and Isaacs inside, but one of the deputies had also seen "an individual run away from the house." "Muddy footprints led to an outbuilding where [McNew] was discovered." He was searched and "coffee filters containing a white powdery substance" were found. They also found a jacket with McNew's ID inside the house. He gave conflicting statements about the jacket.

All three were indicted. McNew was convicted of manufacturing methamphetamine and appealed.

ISSUE: Is a subject who flees from the location of a clandestine lab be convicted for constructive possession of that lab?

HOLDING: Yes

DISCUSSION: McNew argued that his only connection to the crime was his presence at the house. The Court, however, noted that he had fled to the outbuilding and that he possessed the white powder, which was sufficient to allow the case to be presented to the jury. The Court agreed that the admission of the evidence about his jacket was also appropriate, as it was relevant to the case. One of the items of ID had McNew's photo but another name, which McNew argued was "irrelevant and overly prejudicial." The Court disagreed, also upholding the information from one of the deputies, on rebuttal, that a receipt bearing McNew's name was also in the jacket.

McNew's conviction was affirmed.

Lowery v. Com.
2010 WL 3722784 (Ky. 2010)

FACTS: On January 31, 2009, Lowery and Kerns drove to several houses around Newport, to sell cocaine. They then drove to Kerns' home in Grant County. On the way, they passed Officer Vance (Newport PD). He saw the car had only one headlight and the occupants were not restrained so he made a traffic stop. Kerns, who was driving, later testified that Lowery gave her two bags of crack cocaine and instructed her to hide it, so she placed it into her vagina. She also hid a crack pipe in her car. The officer later testified that Kerns continued to drive for longer than was typical before pulling over in response to a traffic stop.

Kerns consented to a search of the car and Lowery to a search of his person. Vance found the crack pipe and arrested Kerns for it. He also found $958 in cash on Lowery, but no drugs. Kerns was, however, arrested for giving a false name, which he apparently did to avoid an outstanding warrant.

Kerns was taken to jail by Officer Buemi, who told her that she "would be subject to a strip search, and that she could face an additional charge for promoting contraband if she took illegal drugs into the jail." She admitted that she'd hidden the cocaine. Officer Buemi handcuffed her in front and gave her privacy to retrieve the drugs. She gave a written statement that they belonged to Lowery.

Lowery was charged with Trafficking and related charges. Kerns was charged, and convicted, for possession. Lowery appealed.

ISSUE: May drugs in actual possession on one subject be constructively possessed by another subject?

HOLDING: Yes

DISCUSSION: Lowery argued that there was no evidence that he constructively possessed the cocaine, and that he had dominion or control over it. The Court, however, found sufficient

evidence that he had, in fact, actual possession of the cocaine. The Court noted that the jury obviously found Kerns to be credible.

Lowery's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - DISCLOSURE OF STATEMENTS

Clutter v. Com.
322 S.W.3d 59 (Ky 2010)

FACTS: In 1998, Clutter was indicted for a sexual assault committed in 1990. Although the crime was reported soon after it occurred, the victim recanted. She later stated she recanted at the request of her mother, who was Clutter's girlfriend and business partner. She came forward again later because she was concerned about her own child being in Clutter's presence. He was not tried until 2008, as he had been taken into federal custody and convicted for an unrelated offense. Upon his release, he was returned to Kentucky, tried and convicted. He then appealed.

ISSUE: May late disclosure of inculpatory statements compromise a trial?

HOLDING: Yes

DISCUSSION: Clutter argued that his belated trial was in violation of the Interstate Agreement on Detainers (IAD). However, the Court agreed that Clutter, acting pro se, did not properly make the request, by completing and submitting the appropriate forms to invoke the speedy trial rights under the IAD. (Clutter had been advised on several occasions that he needed to do so.) The Court found no error.

Clutter also argued against the admission of an oral statement made by a witness in 1990, to the effect that he had had sex with the victim. The Commonwealth agreed that the disclosure of the statement on the day before trial was untimely under RCr 7.24, and agreed it would not use the statement in its case-in-chief. The Court agreed over objection that it could be used in rebuttal, if needed. Although it was never actually introduced, Clutter argued "that his right to testify in his own defense was compromised by the potential for the admission of the incriminating statement and reversal is thus warranted." Although the Court agreed the delay was improper, the Court found no prejudice was caused by the untimely disclosure.

Clutter's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - KASPER

Commonwealth of Kentucky, Cabinet for Health and Family Services v. Hon. Gregory M. Bartlett (Kenton Circuit Court) and Cole, Cox and Young (real parties)
316 S.W.3d 279 (Ky. 2010)

FACTS: Cole and Young shared a home in Kenton County. After being flagged by KASPER[36], police obtained a search warrant and searched the home. As a result, Cole was indicted for drug trafficking. He requested his own report, as well as that produced on Cole and another defendant, Cox. He moved for suppression of the warrant affidavit, claiming it contained false and misleading information about Cole's report. The trial court granted the request for discovery, but the Cabinet (which maintains KASPER) moved to vacate the order, arguing that KRS 218A.202[37] prohibits the trial court from ordering discovery. Following a hearing, the trial court refused to vacate its order. In addition, the Court noted that "Cole made a sufficient showing that the records he sought 'may contain information which is relevant or exculpatory to the Defense.'" It ordered the document produced for in camera review. The Cabinet filed for writs of prohibition and mandamus to prevent enforcement of the court order. The Kentucky Court of Appeals denied the writ and the Cabinet further appealed.

ISSUE: Must KASPER reports used to support search warrants or arrests be disclosed to the defendant?

HOLDING: Yes

DISCUSSION: The Cabinet continued its argument that the statute prevented the court from ordering the disclosure of the KASPER report. Relevant to this case, the statute does not permit the disclosure of the reports to "criminal defendants, their counsel, or to the trial court" – by its language listing the only parties permitted to receive the reports. The Court stated, however, that:

> … this argument overlooks the unique constitutional considerations that arise in criminal cases. Criminal cases are simply different because of the unique constitutional rights enjoyed by criminal defendants.

The Court continued:

> Whatever prohibition against disclosure KRS 218A.202 makes, it cannot infringe on a criminal defendant's rights under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution or Section 11 of the Kentucky Constitution. Under the Cabinet's view, a criminal defendant could not discover any report, even his own. It would not matter if the report contained exculpatory information, or even if it was exonerating. The trial court would be unable to compel disclosure, even by a court order, and even if the court first screened the documents in camera to protect the confidentiality of any information that was not actually exculpatory. This cannot be the case.
>
> It is well established that a criminal defendant has a constitutional right to discover exculpatory documents, even if those documents are confidential or if their disclosure is prohibited by rule or statute.[38] The U.S. Supreme Court has held that a criminal defendant's Sixth Amendment right to confront witnesses prevails over

[36] Kentucky All-Schedule Prescription Electronic Reporting.
[37] This statute provides a list of those who are permitted to receive the report.
[38] Com. v. Barroso, 122 S.W.3d 554 (Ky. 2003).

> the government's interest in keeping juvenile records confidential.[39] It has also held that a defendant's due process right to present a defense prevails over evidentiary rules and privileges.[40]
>
> In addition, the U.S. Supreme Court has held that a defendant's right to discovery exculpatory evidence in the government's possession prevails over a qualified privilege.[41]
>
> In Barroso, this Court extended the logic of Ritchie, unanimously holding that a defendant's constitutional right to discover exculpatory evidence prevails over absolute privileges, too.
>
> The common and necessary thread of these cases is that a criminal defendant's constitutional rights to exculpatory information prevail over rules and statutes that prohibit the defendant from receiving the information. This is true even if those rules or statutes purport to absolutely prohibit disclosure. To put it simply, "constitutional rights prevail over conflicting statutes and rules."

The Court agreed, however, that in order to invoke the right to view such otherwise confidential documents, it was required to follow the two-step process set out in Barroso. First, "the defendant must produce 'evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence.'" Next, "the trial court must conduct an in camera review to determine whether or not the records sought actually do contain such evidence." The process provides the appropriate balance between the defendant's rights and the "government's interest in keeping certain records confidential."

In the case at bar, the trial court properly applied the Barroso procedure. The Court discounted the Cabinet's argument that the reports contained only raw data, and agreed with Cole that instead, the data was "detailed and specific," as well as being "readily understandable and concrete, requiring little if any further analysis before its impeachment becomes apparent."

The Court concluded:

> … the Cabinet's only argument is that the statute prohibits disclosure and "[c]ourts may not add or subtract from statutes." No court has added or subtracted anything from any statute; the Kentucky and U.S. Constitutions have already done all the work.

The Court upheld the denial of the Cabinet's writ.

In a footnote, the Court also commented upon the record, which indicated that the prosecutor had a copy of at least two of the three reports, finding it noteworthy because according to the statute, the prosecutor is not authorized to receive the reports either. It stated that it appeared that the

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[39] Davis v. Alaska, 415 U.S. 308 (1974).
[40] Chambers v. Mississippi, 410 U.S. 284 (1973); Roviaro v. U.S., 353 U.S. 53 (1957).
[41] Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

Cabinet thought it could "rely on a statute to deny the criminal defendant access to potentially exculpatory reports, even though the prosecution has a copy of those same reports in violation of the same statute."

Oakes v. Com.
320 S.W.3d 50 (Ky. 2010)

FACTS: On the night in question, Kustes and a co-worker went to a Bullitt County White Castle to eat. A man (Oakes) approached them and "began flirting." When they left, Oakes approached them and warned her that he'd heard two officers saying they would pull her over and offered her a ride home. She declined the offer. On the way home, Kustes had to stop at train tracks. According to a witness, Oakes got out of his car and approached Kustes's car -"Kustes heard a 'thump' on her driver-side window." She saw Oakes, left the scene and and later discovered that her door handle had been broken.

Kustes continued on to drop off her friend. When she arrived in her own driveway and turned off the car, her driver's side door was "immediately opened." Oakes leaned into her car and said, "What's up, girl?" Kustes grabbed her purse and tried to run, but Oakes grabbed the purse and struck Kustes in the neck and side. Kustes dropped the purse; Oakes took it and ran.

Kustes called police and Det. McGaha arrived. She gave him a description of the assailant and the officer also obtained surveillance video as well. Oakes was identified by a Louisville officer who had previously arrested him. McGaha constructed a photo pak and Kustes immediately identified Oakes.

Oakes was ultimately convicted of Robbery 2nd and PFO 2nd, and appealed.

ISSUE: May KASPER reports be used in impeachment?

HOLDING: No (but see discussion)

DISCUSSION: First, Oakes argued that he was improperly denied the opportunity to introduce a KASPER record to impeach Kustes. The Court agreed that Oakes could "invade the KASPER privilege to receive exculpatory information or to use such information in his defense," but the Court noted that it could "still be excluded under [the] rules of evidence, such as for lack of relevance, just like anything else." The Court found that evidence that the victim may have misused a prescription painkiller was extrinsic evidence and not relevant. (Oakes was suggesting that she was actually selling the medication.) The Court noted that the only entries that suggested this came after the date of the indictment. As such, the Court denied this argument.

Oakes also argued that the failure of Kustes to show up at a pre-trial suppression hearing concerning the admissibility of the identification violated his right to confrontation. The Court, however, agree that the right is a trial right, not a pretrial right.[42] The Court agreed that her presence was not required.

[42] Pennsylvania v. Ritchie, 480 U.S. 39 (1987); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968).

The Court then reviewed the identification procedures and concluded it was not impermissibly suggestive. The Court agreed that Oakes's photo "stands out to some extent" because of his attire, and because the photo was taken at a higher resolution, but otherwise was sufficiently similar. Finally, the Court noted the Kustes's description corroborated and supported her later identification of the photo.

Oakes's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - WITNESS TESTIMONY

McClendon v. Com.
2010 WL 3722788 (Ky. 2010)

FACTS: On September 28, 2007, Deaton and her friend, Aistok, were drinking beer at her home in Kenton County. They decided to walk several blocks to get some food. On the way back, they were approached by McClendon who was "carrying an open beer and the remains of a twelve pack and appeared to be highly intoxicated." He asked about buying more liquor and Deaton suggested a location. McClendon asked if she'd drive him, in his truck, parked nearby. Deaton agreed to do so. Aistok, however, went her separate way.

Deaton became frightened when she did not see a vehicle where he'd said he'd parked. He then forced her into a yard and sexually assaulted her. During that time, the resident heard noises and called the police, and witnessed part of the assault. Officer Steffen arrived and saw McClendon flee and jump over a fence. He did not comply with commands but was eventually was apprehended. He told the officer that "Deaton had performed oral sex on him in exchange for crack cocaine."

McClendon was indicted and stood trial. He testified that Deaton had performed oral sex in exchange for drugs at least twice before and that their encounters were consensual. During the testimony, a SANE nurse testified as to Deaton's statements during the exame. McClendon was convicted and appealed.

ISSUE: May a witness (a forensic nurse) read statements from the victim, recording in their report, verbatim?

HOLDING: No

DISCUSSION: McClendon first objected to the testimony of Mertens, a SANE nurse. She "effectively read Deaton's history statement verbatim" which McClendon argued impermissibly bolstered Deaton's statement.

The Court began:

> Kentucky law has long been clear that "a witness cannot be corroborated by proof that on previous occasions [she] has made the same statements as those made in [her] testimony."

The Court agreed it was improper to have allowed the testimony, which "merely showed prior consistent statements from Deaton." However, the report did not identify McClendon as the assailant. Her testimony was also "clearly within the bounds of the medical treatment or diagnosis exception to the hearsay rule" – KRE 803(4). However, because Deaton's testimony alone was sufficient for the jury to find guilty, the Court found the error, if any, was harmless, since his act of fleeing suggested guilt. The Court agreed, as well, that allowing her to read directly from the report was also error.

McClendon's conviction was reversed.

Wortman v. Com.
2010 WL 3377743 (Ky. 2010)

FACTS: In 2007, Mathis overhead a conversation between her minor daughter, S.M. and a friend in which S.M. indicated she had a sexual relationship with Wortman. Mathis confronted Wortman and he denied it. Mathis contacted the Louisville Metro police.

S.M. later testified that they began a sexual relationship when she was about 10 and Wortman was a neighbor. He came to visit her mother and help around the house. During the duration of their sexual relationship, they also chatted daily and discussed sex. "The explicit transcripts of these online chats were introduced during trial." S.M. discussed vaginal, oral and anal intercourse. She also identified a witness to Wortman kissing and touching her.

Wortman was charged with multiple counts of Rape, Sodomy and Sexual Abuse. He was convicted on most, but not all, of the counts. He then appealed.

ISSUE: Is witness credibility for the jury to decide?

HOLDING: Yes

DISCUSSION: Wortman argued that the inconsistencies in S.M.'s testimony required a directed verdict in his favor. The Court, however, agreed that her testimony alone "was sufficient to withstand" the motion. The chat transcripts corroborated S.M.'s allegations. Although S.M. did give untruthful statements originally to the investigating detective and case worker, she admitted that at trial and explained why she did so. The Court noted that the credibility of a witness is within the purview of the jury to decide.

Wortman's conviction was affirmed.

Pence v. Com.
2010 WL 2867834 (Ky. App. 2010)

FACTS: Pence stood trial for Trafficking in Perry County. Three detectives testified at the trial. Pence was convicted and appealed.

ISSUE: May a witness bolster the testimony of another witness?

HOLDING: No

DISCUSSION: Pence argued that Detective Napier was permitted to "introduce improper character evidence" that Turner, the CI, did a "good job." The Court noted that generally, "a witness's credibility may not be bolstered until it has been attacked."[43] The issue is covered by KRE 608 on character evidence. In this case, Det. Napier testified before Turner, therefore his character could not yet have been at issue. The Court noted that "when rehabilitation evidence is admitted before credibility is attacked, any error is harmless as long as credibility is, in fact, later impeached."[44]

The Court agreed that statements made by Det. Napier reflected favorably on the CI's truthfulness, with respect to never having had money come up short or transactions not "matching up." The Court differentiated this from testimony concerning the CI's reliability.

The Court also concluded that the video of the transaction was not hearsay, but was "evidence of the event itself, introduced for a non-hearsay purpose." The Court noted the recording was shown only twice.

Pence's conviction was upheld.

Keim v. Com.
2010 WL 3722785 (Ky. 2010)

FACTS: During summer, 2007, Keim's nephew, J.G. and niece, B.G, both under 16, visited Keim in Christian County. On the night in question, he invited B.G. to call a neighbor, D.S., to ask if she wanted to spend the night at Keim's home. During that evening, the four "drank alcohol and watched pornography." B.G. and D.S. were told to "undress and dance with each other." They played "drinking games" and D.S. fell asleep, but she awoke and witnessed Keim and K.S. having intercourse.

In May, 2008, they again visited and Keim swam nude. They began smoking a "green drug" in a pipe and D.S. and B.G. became intoxicated. The girls stripped and Keim performed oral sex. Allegedly he also made J.G. and D.S. have intercourse, although D.S. later stated she wasn't sure if it actually took place. Also, allegedly, D.S. performed oral sex on Keim.

[43] Harp v. Com., 266 S.W.3d 813 (Ky. 2008).
[44] Reed v. Com., 738 S.W.2d 818 (Ky. 1987).

J.G. told his grandmother about the incidents. Det. Green (Hopkinsville PD) investigated and a computer and pornographic movies were seized. At the subsequent trial, several witnesses testified to Keim's possession of the pornography. Keim objected, as he'd received no results on the computer seizure - but apparently, the computer was never actually searched. The Court agreed that it was improper to mention the pornography and offered an admonition to the jury, but following that, one of the witnesses again mentioned viewing pornography. Finally, Det. Green mentioned it and again, Keim objected. Again the judge sustained the objection but denied a mistrial.

Ultimately, Keim was convicted of Unlawful Use of a Minor in a Sexual Performance, Unlawful Transaction with a Minor and Sexual abuse. He appealed.

ISSUE: May possession of legal pornography be introduced in evidence in a sexual assault case?

HOLDING: Yes (but see discussion)

DISCUSSION: Keim argued that the multiple statements regarding his possession of pornography, which was irrelevant and unduly prejudicial under KRE 403, warranted a mistrial. The Commonwealth argued that his possession of the material "was relevant in that it explained his overall scheme, plan, and intent." The Court agreed that the evidence was, in fact, relevant and was necessary to allow the jury to "see the entire picture." The Court agreed that he may have been using the pornography "as a catalyst to arouse the children, inducing them into performing a sexual act while he observed."[45]

The Court further agreed that it was "indeed adverse" … "but nothing more." It was also probative of an element of the case as well.[46] The Court found error, if any, to be harmless and upheld Keim's conviction.

Davenport v. Com.
2010 WL 3722787 (Ky. 2010)

FACTS: Davenport stood trial for several robberies and a non-fatal shooting that occurred in Owensboro, on January 22, 2008. A witness testified that "she cared for Davenport because he did not have anyone since he was 'always in trouble,' but that 'out of jail' they did not have a [sic] much of a relationship." She further stated the "he's been locked up his whole life." Davenport objected, and the prosecutor stated that "this information had never come up in prior conversations with [the witness] and thus the statements were totally unexpected." The Court denied Davenport's request for a mistrial but did admonish the jury.

Davenport was ultimately convicted and appealed.

ISSUE: May a witness who refers to a defendant's past criminal history testify to that fact?

[45] U.S. v. Postel, 524 F. Supp. 2d 1120 (N.D. Iowa 2006).
[46] Gilbert v. Com., 838 S.W.2d 376 (Ky. 1991).

HOLDING: No (but it may not be fatal to the case)

DISCUSSION: Only the latter statement was preserved on appeal, so the appellate court did not concern itself with the earlier statement. The Court noted that the totality of the evidence "overwhelmingly pointed to Davenport as being involved" and as such, the statement did not unduly prejudice his case. The question asked of the witness was appropriate and her "remarks were not responsive to the question."

The Court found the admonition to be sufficient and upheld Davenport's conviction.

Howard v. Com.
2010 WL 3604126 (Ky. App. 2010)

FACTS: On August 31, 2008, Howard (Elliott County Jailer) was transporting Senters from Elliott County to Boyd County. When she was being booked, she told a female guard that Howard had raped her. KSP responded and Senters was taken to the hospital. Sexual contact was confirmed. Testimony later indicated she was "very upset and crying."

Det. Kouns was assigned, and he obtained a search warrant for Howard's cruiser, where physical evidence was found. He interviewed Howard twice, in the first statement, he denied having had sex with her, but he admitted it in the second interview. He claimed it was consensual. During Det. Kouns' testimony at trial, he was permitted to "essentially read from the transcript of his interview with Senters." Senters also testified, apparently consistently. When the defense counsel objected to this as impermissible hearsay and improper bolstering by the repeating of "prior consistent statements," the Court admitted the recording instead. Howard was indicted and convicted. He then appealed.

ISSUE: May a witness read from a transcript of an interview with a victim?

HOLDING: No

DISCUSSION: Howard objected to Kouns being permitted to read from his report, bolstering Senters. The prosecution argued that the statements were being offered not for the truthfulness of the statement, but "rather to demonstrate why Det. Kouns took the actions that he did." The Court reviewed KRE 802 and concluded that it could not "agree that reciting and/or playing Senters' taped statement was admissible for the purpose of explaining Det. Kouns' investigative actions."[47] The Court agreed that the multiple hearing of Senters' statement impermissibly bolstered her initial statement, perhaps giving her more credibility – and since Howard admitted to sex, Senters' credibility was pivotal to the case.

Howard's conviction was reversed and the case remanded.

[47] Sanborn v. Com., 754 S.W.2d 534 (Ky. 1988); Eubank v. Com., 275 S.W. 630 (1925); Winstead v. Com., 283 S.W.3d 678 (Ky. 2009).

TRIAL PROCEDURE / EVIDENCE - EXPERT WITNESS

Hayes v. Com.
2010 WL 2629561 (Ky App. 2010)

FACTS: On June 28, 2007, Officer Kelton (unidentified Shelby County area agency) did an undercover buy of crack cocaine in that area. He had parked in an area known for trafficking and been approached by a female, who ultimately summoned Hayes to the van. Hayes then left, and the officer could see him hand a rock of crack to a female. She exchanged the rock with Kelton for a fifty dollar bill, the serial number of which he had previously recorded on his "digital audio recorder." The transaction was also recorded on audio, but Hayes never spoke. After he drove away, Kelton described Hayes and the two women involved. Kelton then had a uniformed trooper film the area so he could identify from whom he made the buy. Trooper Martin did so and Kelton identified Hayes. Hayes was then arrested and searched; the bill he'd gotten from Kelton was found on his person.

At trial, Det. Warman (Shelbyville PD), a long time narcotics investigator, testified that "it was not unusual to use another person as a go-between in order to limit exposure and to avoid the police." The trial court allowed the testimony and Hayes was convicted. He appealed.

ISSUE: May an expert witness testify as their opinion of how a subject's actions fall into the category of drug dealers?

HOLDING: No

DISCUSSION: Hayes argued that it was inappropriate to allow a detective to explain that the lack of illegal narcotics on his person indicated he was a dealer. The Court agreed that the Commonwealth was correct that "courts have routinely admitted expert testimony to explain evidence in regard to the drug trade," but that this case could be distinguished. In this case, the Court agreed that "the opinion as expressed by the expert of the habit of a class of individuals, i.e., drug dealers, was an attempt to prove that Hayes was a member of the class and acted in accordance." The Court found that the "trial court exceeded its discretion in allowing expert testimony regarding the habits of drug dealers in an attempt to prove that Hayes was a drug dealer and guilty of trafficking."

In addition, Hayes argued that it was error to admit "a digital audio recordings which was only a copy of a copy of the original when the police had destroyed the original." Kelton had "downloaded the recording onto his computer and then transferred the audio file to a CD that was played in court." The Court found that the evidence was authenticated and that there was "no legitimate good faith belief that the recording was not an accurate duplicate." While the potential for tampering always exist, there was no evidence to that effect in this case. There was no evidence of bad faith in the destruction of the original recording, and the jury was properly instructed that the "recording was only a copy and not the original."

The conviction, however, was reversed on the first issue and remanded for further proceedings.

TRIAL PROCEDURE / EVIDENCE - PHOTOGRAPHS

Hallman v. Com.
2010 WL 3377749 (Ky. 2010)

FACTS: Hallman was charged in the shooting death of his wife, Kimberly, in Bullitt County. (He argued that she actually shot herself, but the evidence suggested otherwise.) Photos of the scene were introduced over Hallman's objections. Hallman was convicted of wanton murder and appealed.

ISSUE: Are gruesome photos of a victim admissible?

HOLDING: Yes (if relevant)

DISCUSSION: Hallman first argued that it was inappropriate to introduce evidence that he had three other handguns in the house. The Commonwealth contended, however, that the presence of the three guns, where Kimberly had ready access, argued against a suicide allegedly committed with a weapon Hallman kept in his vehicle and only brought inside during an argument between the pair. The Court agreed the admission of the guns was appropriate.

Hallman also argued photographs of Kimberly were improperly admitted. The Court agreed that "any photograph of a deceased victim is to some extent inflammatory" but that does not "foreclose the jury from viewing a gruesome photograph" if it is relevant to the crime. The Court reviewed the record regarding the photos. One was introduced, for example, as proof that CPR was not performed upon the victim, another to support the medical examiner's testimony that the wound was immediately incapacitating and that Kimberly could not have spoken (as Hallman alleged) after the shooting. The latter was taken during the autopsy and depicted the skull cap and brain removed. The Court agreed the changes were made to help the jury understand the circumstances of the death.

Hallman's conviction was affirmed.

Rogers v. Com.
2010 WL 3377754 (Ky. 2010

FACTS: On June 14, 2007, in Caldwell County, Penny and Kathy McGregor were the unintended victims of a shooting by Rogers, who had "opened fire with an assault rifle into the trees." He was attempting to kill two men. He was charged with "two counts of intentional murder under the doctrine of transferred intent." Rogers claimed that one of the two intended victims had fired at him first, and that he had fired back in self defense. At trial, 27 autopsy photos were introduced over his objections.

Rogers was convicted and appealed.

ISSUE: May a subject who views an autopsy introduce photos from the autopsy?

HOLDING: Yes

DISCUSSION: Rogers first argued that the admission of 27 autopsy photos was prejudicial. The Court agreed that "each was designed to show something different, and hence were not cumulative to the extent that they did not show the same thing over and over." Although the number was "on the high side," the Court agreed that the prosecution was entitled to prove it's case and that stipulation of the nature of the wounds was not permitted over the prosecution's objection.

He further argued that the photos were not admitted through the medical examiner, as she was in the hospital and unable to testify. The deputy coroner, who had seen the bodies and signed the death certificate was permitted to testify, but he did not attend the autopsy. The Court postponed ruling, and an officer who was present at the autopsy testified that the photos "fairly and accurately depicted the bodies" of the victims. There was no medical testimony. The Court agreed the photos were relevant and admissible.

Rogers' conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - CROSS-EXAMINATION

Moorman v. Com.
2010 WL 3717232 (Ky. App. 2010)

FACTS: On May 4, 2006, Detectives Braden and Conley (KSP) met with Rose, a CI, to arrange for a controlled buy of cocaine in Henderson. He was given money, fitted out with a surveillance device and taken to the location. Rose found an unfamiliar man there, not his "expected dealer." He returned to Det. Braden's car for advice and they decided he should attempt to make a buy. He was successful in doing so and the pair returned to the KSP post. Det. Conley observed a man leaving the location but he did know that he was relevant to the drug transaction. After looking at photos from an Owensboro PD database, they determined that Moorman was the unknown man. He was indicted for Trafficking. At trial, Rose testified that he was a convicted felon and had previously worked as a CI, and that he normally was paid for that service. However, Rose could not recall if he'd been paid in this case. Rose also testified that he had, on occasion, assisted to receive leniency for his own crimes, but that it was not the case in Moorman's situation. He agreed he "faced criminal charges at the time of the drug purchase."

Det. Braden testified that he had worked with Rose for some time and that he believed Rose was "working off" his own charges when he assisted in Moorman's case, but that he did not know if Rose was paid since it was Det. Conley's case. (Det. Conley testified Rose was not paid.) Moorman was convicted and appealed.

ISSUE: Must a defendant be permitted to engage in a meaningful cross-examination of a witness?

HOLDING: Yes

DISCUSSION: Moorman contended that he was prevented from cross-examining Rose about the status of the pending charges and was thus was not able to potentially impeach Rose's credibility. The Court agreed that every criminal defendant had a right to "present a complete and meaningful defense" and that central to this, the Confrontation Clause permitted them to "engage in cross-examination designed to reveal a witness's bias or to undermine his credibility."[48] However, the Court noted, "trial courts have discretion to set evidentiary boundaries as long as a reasonably complete picture of the witness's veracity, bias and motivation is permitted to be established."[49]

Moorman was not permitted to ask Rose about the nature of his pending charge and was not permitted to ask Rose if "he was on any type of conditional discharge, probation, or parole." However, the Court agreed that what was presented to the jury was sufficient to give a "reasonably complete picture" of Rose and that it was not an abuse of the court's discretion to limit the cross-examination.

Moorman also complained that Det. Conley's testimony that he had obtained Moorman's photo from a police database, impermissibly suggested to the jury that "he had been arrested prior to the drug transaction." Although the Court agreed that it might be prejudicial, because he did not raise the issue at an earlier stage the Court could only review whether it was "palpable error." Because of the other admissible evidence, the Court concluded that there was "not a substantial possibility that this case would have resulted differently absent the admission."

Next, Moorman contended that the prosecution did not comply with discovery orders to "notify the defense about any deals the Commonwealth may have had with Rose and how Moorman was identified to" the investigator. The Court agreed that "under Brady[50], the prosecution's intentional or unintentional non-disclosure of evidence favorable to a defendant violates his due process rights where the evidence is material to his guilt or punishment."[51] Such evidence "is only material when there is a reasonable probability that, had the evidence been given to the defense, the outcome of the case would have been different."[52]

The Court concluded that "there was no clear deal between the Commonwealth and Rose" in this case, but that the information provided would have indicated to the jury that "Rose was not assisting the police for altruistic reasons but rather he expected something in return." Brady did not require that Rose's criminal record be disclosed since that information was available in the public record.[53]

Next, Moorman argued that Det. Conley's testimony that he saw Moorman open the door and admit Rose was impermissible, since he actually observed that on the surveillance video, not in person.[54] The jury was admonished upon objection, but the testimony was later replayed to the jury during deliberations. The Court agreed that the trial court should have redacted the testimony

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[48] Beaty v. Com., 125 S.W.3d 196 (Ky. 2003); Holt v. Com., 250 S.W.3d 647 (2008).
[49] Com. v. Maddox, 955 S.W.2d 718 (Ky. 1997).
[50] Brady v. Maryland, 373 U.S. 83 (1963).
[51] U.S. v. Agurs, 427 U.S. 97 (1976).
[52] Shepherd v. Com., 251 S.W.3d 309 (Ky. 2008).
[53] Sanborn v. Com., 892 S.W.2d 542 (Ky. 1994).
[54] KRE 602.

and not allowed it to be replayed, but did not find that error to be so harmful as to overturn the verdict.

Finally, Moorman challenged the single picture lineup in which Det. Conley identified Moorman. However, the Court found that "under the totality of the circumstances"… it concluded … "that the witnesses' identification did not constitute palpable error."[55]

Moorman's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - PRIOR BAD ACTS

Brinegar v. Com.
2010 WL 3360695 (Ky. App. 2010)

FACTS: On April 4, 2005, an Estill County church was destroyed by arson. During the investigation, Wilson and Brinegar "each made formal statements indicating the other's involvement in a total of five fires." However, they were charged only in this church fire. Wilson took a plea deal and testified against Brinegar, stating specifically that Brinegar "repeatedly manipulated her into starting a number of fires in Estill County, including the fire that burned down the church." Brinegar objected at trial but the information was admitted.

Ultimately Brinegar was convicted and appealed.

ISSUE: Is evidence of prior bad acts that demonstrate a common scheme or plan admissible?

HOLDING: Yes

DISCUSSION: The Court noted that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[56] However, such evidence of "prior bad acts" may be admitted if: it is offered to prove a common scheme or plan; such evidence is relevant to serve a purpose other than provide a defendant's criminal disposition; and the probative worth and need for the evidence outweighs potential prejudice to the accused."[57]

Looking to the "common scheme or plan exception," the Court noted that if "the method of the commission of the other uncharged crimes is so similar as to indicate a reasonable probability that all of the crimes were committed by the same person, evidence that the defendant committed the other uncharged crimes is admissible to show a common scheme or plan."[58] "Common facts rather than common criminality are the keystone of such an examination."[59]

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[55] Edmonds v. Com., 906 S.W.2d 343 (Ky. 1995).
[56] KRE 404(b).
[57] O'Bryan v. Com., 634 S.W.2d 153 (Ky. 1982).
[58] Com. v. English, 993 S.W.2d 941 (Ky. 1999); Billings v. Com., 843 S.W.2d 890 (Ky. 1992).
[59] Lear v. Com., 884 S.W.2d 657 (Ky. 1994).

In this case, the Court noted that the "evidence not only indicates that Brinegar committed similar crimes within the previous three weeks, but that he committed them in the same geographic vicinity, that in each case he directed a fire to be started in a particular way, sometimes reporting the fire himself, and was on site to put out each fire in question." That constituted a "signature of sorts" under the provisions of Adcock v. Com.[60] The Court found it was relevant under KRE 401 and helped clarify Brinegar's course of conduct over the time leading up to the fire in question.

The Court found the evidence admissible and affirmed the conviction.

Drane v. Com.
2010 WL 3377756 (Ky. 2010)

FACTS: Drane was involved in a series of events that ranged from Gary, Indiana, to Louisville and Frankfort. On March 7, 2003, Buchanan was shot and killed by Drane. The victim's brother told investigators about a prior event in Gary and another told them about an incident in Louisville. Both of the earlier cases involved attempts to kill Buchanan, who had witnessed a murder by Drane and others. Drane was never charged in the earlier attempts, but information about the prior cases was admitted in the trial.

ISSUE: May prior evidence of a similar crime against the same victim be admitted?

HOLDING: Yes

DISCUSSION: Drane argued that the admission of evidence of his prior attempts to murder Buchanan was improperly admitted under KRE 404(b). The Court agreed that normally, such evidence to show "conformity with the behavior" is not admissible. However, in this case, the "prior bad act admitted into evidence does not solely function to illustrate a disposition to attempt murder." Instead, "on the contrary, the evidence of Appellant's previous attempt - one of two prior attempts - to kill the murder victim in this actual case shows drastically more than a possible violent disposition." In this case, it is "clearly relevant, among other possible reasons, to prove his intent to kill" Buchanan. It serves as both circumstantial and direct evidence - the former because he "apparently wanted Herman Buchanan dead in February, it makes it more likely that he is the person who killed him in March." Just as a prior threat would be admissible, a prior attempt will be also admissible. It is direct evidence that Drane had the "necessary *mens rea* to satisfy" the element of intent.

Dranes' conviction was affirmed, but his sentence was remanded back for an unrelated error.

TRIAL PROCEDURE / EVIDENCE - JUDICIAL NOTICE

Carter v. Com.
2010 WL 3604165 (Ky. App. 2010)

FACTS: Trooper Morgan (KSP) tried to stop Carter for traveling 81 mph in a 55 mph zone in Allen County. Carter did not stop "and a chase ensued," but Trooper Morgan was able to

[60] 843 S.W.2d 890 (Ky. 1992).

identify Carter as the driver. The trooper testified that the "chase occurred during daylight and neither vehicle had activated their headlights." At trial, Carter tried to introduce "a document from the naval observatory that detailed the time of sunset on the day of the arrest to impeach" the trooper's testimony.

The Commonwealth objected and the trial court sustained, finding that a "lay witness's interpretation of the document's meaning would be speculative." Carter was ultimately convicted of a variety of charges, including fleeing and evading and wanton endangerment. He appealed.

ISSUE: Is unofficial documentation of a fact (time of sunset) admissible without further explanation?

HOLDING: No

DISCUSSION: Carter argued that the naval observatory document "was admissible without additional foundation under KRE 902" as an official publication. The Court agreed that the "report was not sufficiently reliable because different interpretations exists as to what constitutes a sunset, specifically, the amount of natural light which remains after a sunset."

The court also agreed that Resisting Arrest is not a lesser included offense to Fleeing and Evading 1st.

Carter's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - DNA

Partin v. Com.
2010 WL 3360319 (Ky. App. 2010)

FACTS: Partin was convicted in 1994 of a Knox County murder. His conviction was upheld following a series of appeals. However, in 2008, he moved the court to "order and fund DNA testing of hair evidence" used in the original trial. When denied, he further appealed.

ISSUE: Is DNA testing permitted post-conviction?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court noted, at the outset, the "while the evidence of Partin's guilt was circumstantial," it was sufficient to support his conviction. The evidence in question was found in his kitchen trash, and evidence was introduced at trial that indicated that the hair was dissimilar to that of the victim's. The Court looked to Bedingfield v. Com., which permits DNA testing (under KRS 422.285) in certain cases, although the Court disagreed to some extent with Partin's characterization of the opinion.[61] However, in Bedingfield, the evidence in question was used to exclude him as the source of the evidence, using tests not available at the time of the original trial.

[61] 260 S.W.3d 805 (Ky. 2008).

In Partin's case, even identifying the source of the hair would make little difference in the jury's decision to convict.

Partin's appeal was denied and his conviction upheld.

CIVIL LITIGATION

Cabinet for Health and Family Services v. Hicks
2010 WL 3604161 (Ky. App. 2010)

FACTS: From May through November, 2007, Hicks alleged that she "had been held captive and physically abused and neglected by her former companions and housemates, Ford, Williams, and the Crawfords. She filed suit against them and the Cabinet (and other official parties), alleging that the latter did not investigate her situation. Following a guilty plea from the housemates, the Cabinet and its employee-defendants, Everidge and Gibson (in their official capacity only) claimed the affirmative defense of sovereign immunity. The Cabinet argued that suing employees in their official capacities is "tantamount to suing the state itself."

Following lengthy proceedings, the trial court judge ruled that the Commonwealth and the Cabinet enjoyed sovereign immunity "but held that state employees sued in their official capacities do not share in that immunity because a jury must ascertain as a question of fact whether the state actor's actions were ministerial or discretionary." The Cabinet and the employee-defendants filed an interlocutory appeal.

ISSUE: Is a government employee sued under their individual capacity subject to qualified immunity?

HOLDING: Yes

DISCUSSION: First, the Court noted that at issue was "whether the Perry Circuit Court erred by failing to dismiss the official capacity claims against state employees after the court held that the action against the Cabinet was barred by sovereign immunity." Hicks argued that "sovereign immunity does not apply to negligent performance of ministerial acts and lawsuits filed against state employees in their official capacities are not the same as suing the state agency."

The Court agreed that "Hick's claim against the social workers in their official capacities is legally indistinguishable from her claim against the Cabinet." The Court looked to Yanero v. Davis[62] and surmised that "when a state employee is sued in his or her official or representative capacity, such actions are under the umbrella of sovereign immunity."

Further:

> Continuing with the analysis, we note the thorough discourse in Yanero about an employee of the state or one of its agencies sued in his or her individual capacity. In such a case, see above, the employee enjoys qualified official immunity.

[62] 65 S.W.3d 510 (Ky. 2001).

> Qualified official immunity "affords protection from damages liability for good faith judgment calls made in a legally uncertain environment." The primary significance of this statement here is that qualified official immunity is only relevant when a state employee is sued in his or her individual capacity.
>
> The court noted that application of the qualified official immunity defense "rests not on the status or title of the officer or employee, but on the [act or] function performed." To apply the defense, it is necessary to classify the particular acts or functions of the state employee in his individual capacity in one of two ways: discretionary or ministerial. Qualified official immunity applies only where the act performed by the official or employee is one that is discretionary in nature. Discretionary acts are, generally speaking, "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment[.]"[63] Discretion in the performance of an act occurs when the act may be performed in one or two or more ways, either of which would be lawful, and the state actor has the will or judgment to determine the performance.[64] In contrast, ministerial acts (functions without immunity) are those that require "only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts."[65]

The Court concluded that the case against the employees in their official capacity should have been dismissed. "Whether the social workers' acts were discretionary or ministerial and subject to qualified official immunity only becomes an issue in claims against the social workers' actions in their individual capacities."

The case was reversed and remanded to the trial court for further proceedings.

Henson / St. Paul Fire and Marine Ins. Co. v. Klein
319 S.W.3d 413 (Ky. 2010)

FACTS: Henson and Klein, both operating personal watercraft, collided on Lake Cumberland. Apparently, Henson was riding in front, and Klein was flanking her, some 30-45 feet, to the rear and her left. Henson turned to shout something to Klein and skewed her person watercraft "sharply to the left and abruptly decelerated to a stop directly in Klein's path." He reacted and tried to avoid her, but did strike her PW. She was seriously injured when she fell from the watercraft. A witness indicated that had Henson not effectively stopped in his path, Klein would not have hit her.

Henson sued Klein, and the jury found in favor of Klein at trial. Henson appealed. The Court of Appeals ruled that the jury wasn't properly instructed when it was told that "Klein's duties were subject to the sudden emergency doctrine" and for failing to instruct that Henson (as the lead PW) "had the right of way over Klein." Klein cross-appealed to preserve his trial claim that the court

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[63] Id. at 522, (citing 63C Am. Jur. 2d Public Officers and Employees § 322 (1997)).
[64] Upchurch v. Clinton County, 330 S.W.2d 428 (Ky. 1959).
[65] Yanero, 65 S.W.3d at 522, (citing Franklin County, Ky. v. Malone, 957 S.W.2d 195 (Ky. 1997)).

erred by not allowing the investigating officer (Fish & Wildlife) to give expert testimony about the collision.

Klein appealed.

ISSUE: Is the sudden emergency doctrine defense available in Kentucky?

HOLDING: Yes

DISCUSSION: The Court reviewed the history and current status of the "sudden emergency doctrine" in Kentucky. The Court looked to Regenstreif v. Phelps, which stated that:

> When a defendant is confronted with a condition he has had no reason to anticipate and has not brought only his own fault, but which alters the duties he would otherwise have been bound to observe, then the effect of that circumstances upon those duties must be covered by the instructions.[66]

The court noted that although there have been no Kentucky boating cases that involve the doctrine, the "concept has been long accepted in maritime litigation."[67] The doctrine effectively lessens the duties that apply to individuals faced with a sudden emergency, which is "exactly what the doctrine requires." In such cases, "the relevant duties change."

The Court continued:

> When the substantive law of the case admits to no specific duties, a sudden emergency instruction may be unnecessary. The general duty to exercise ordinary care for one's own safety and the safety of others is universally present and never changes, although the conduct that constitutes a violation of the general duty may depend on the circumstances.

When there is a specific statutory duty, however, "it must be incorporated into a jury instruction as a 'specific duty.'"[68] But "where one's ability to conform to a specific duty is arguably affected by the presence of a sudden an unexpected peril, the jury is not adequately or fairly informed of what the substantive law requires unless the specific duty is qualified with a sudden emergency instruction." The law recognizes "that in an emergency, with little time for deliberation, the obligation to obey a specific duty may yield." The Court found the instruction appropriate, even necessary, to fairly present the case to the jury.

The Court also looked at the specifics of the accident and noted, in "nautical terms," that Henson was the one who changed course and entered "Klein's anticipated line of travel." The Court also noted, in passing, that KRS 235.285 mentions the "rules of the road," without identifying or defining

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[66] 142 S.W.3d 1 (Ky. 2004).

[67] The Court also noted although the doctrine applies "to any field of human endeavor" – it only appears to come up in the "context of transportation cases, perhaps because that activity very frequently combines the risks of exposure to injury with a need to respond quickly to changing conditions."

[68] Humana of Kentucky, Inc. v. McKee, 834 S.W.2d 711 (Ky. App. 1992).

those rules. The Court did not agree that it was appropriate to apply the rules normally applied to motorists to boaters, given that "boats and automobiles have very different operating characteristics and mechanical systems, and they operate in very different environments." The court found it more likely that the statute was referring to the "Inland Navigation Rules" and asked the General Assembly to clarify that point.

The Court found in favor of Klein.

MISCELLANEOUS

Deters v. Taliaferro
2010 WL 3719917 (Ky. App. 2010)

FACTS: Deters, an attorney, represented Burden in a arrest in Kenton County. He later filed a lawsuit against the arresting officer, Independence and Kenton County. However, prior to the filing, he sent a letter to several attorneys that would be representing plaintiffs, along with two others, detailing the facts and circumstances of the case "as well as his theory that the arrest of Burden stemmed from the police officers' desire for Burden and their jealousy of Burden's boyfriend, who they suspected of drug use." He claimed the officers conspired and planted evidence in her car and falsified reports.

Upon learning of the letter, the officers filed suit against Deters for defamation and related claims. Deters then sued Taliaferro (who represented the officers) and the police officers (as well as the law firms representing the officers) claiming that the lawsuit against him was "malicious retaliation for filing the original lawsuit." Taliferro moved for dismissal, which the trial court granted. Deters appealed.

ISSUE: Is an attorney representing officers in a lawsuit subject to suit?

HOLDING: No

DISCUSSION: The court reviewed the case law on abuse of process and agreed that Taliaferro (an attorney) did nothing but carry out the judicial process to its authorized conclusion. The court upheld the dismissal of Deters' complaint.

Johnson v. Kentucky State Police (Board of Claims)
2010 WL 2788156 (Ky. App. 2010)

FACTS: On November 22, 2003, Johnson was struck by a KSP trooper, Smith, who was running with lights and siren. Johnson had previously "yielded to three other police vehicles by moving her car to the right shoulder of the road." The trooper "attempted to pass" in the southbound lane (apparently against traffic) and as Johnson turned, she was struck by the cruiser.

Johnson was injured in the collision and filed with the Board of Claims. In various pleadings, she admitted that "she had been aware of another emergency vehicle somewhere behind her, in addition to the three other KSP cars she had allowed to pass." She admitted, also, that she "had

seen additional emergency lights in the distance" and "believed other emergency vehicles would be approaching shortly." She stated she did not see Smith's vehicle, however. She was attempting to "exit the road entirely to permit additional emergency vehicles easier passage" and believed she had sufficient time to do so before they approached.

KSP contended the wreck was entirely Johnson's negligence. A video showed the few seconds just prior to the wreck and ends when the wreck occurred. The Board of Claims ruled in favor of KSP, as did a Clay Circuit Court. Johnson appealed.

ISSUE: May an injured subject file an action against a state employee through the Board of Claims?

HOLDING: Yes

DISCUSSION: Johnson argued that the Board's decision to grant summary judgment to the KSP because of negligence was improper. The Court noted that the "Board improperly weighed the evidence instead of merely determining whether there were genuine issues of material fact; likewise, it did not construe the facts in the light most favorable to Johnson." The Court found whether Johnson was "aware of the proximity" of the KSP cruiser to be a "genuine issue of material fact."

The Court found the video "far from conclusive" to show that Johnson was aware of the KSP vehicle. A second area of disagreement is whether the trooper "was exercising due care given the circumstances" since Johnson argued that "she and other witnesses would testify that the trooper was driving too fast given the traffic and road conditions of that night" which "gives rise to the possibility of comparative negligence."[69]

The court noted that at that stage of the proceedings, it was required that the Board weigh all evidence in the light most favorable to Johnson. Instead it "impermissibly engaged in the type of fact finding which should have been reserved for a hearing."

The Court reversed the decision of the Board of Claims and remanded it back for further proceedings.

OPEN RECORDS ACT

Valentine v. Personnel Cabinet
322 S.W.3d 505 (Ky. App. 2010)

FACTS: Valentine made an Open Records request for the personnel file of the prosecuting attorney in his criminal case. Upon appeal, the Attorney General's Decision indicated Valentine was entitled to the records, but the Circuit Court, upon an appeal of that decision, reversed it. Valentine appealed.

[69] Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984).

ISSUE: Is the personnel file of a government employee completely available through Open Records?

HOLDING: No

DISCUSSION: The Attorney General's Decision determined that once the file was stripped of private information, it was "otherwise subject to inspection." The trial court had held that "Valentine's request would serve no valid public interest and appeared to be motivated only by personal curiosity." In fact, he had made several requests, trying to discover personal information of everyone involved in his case.

The Court agreed that "when balanced against the invasion of privacy sought by Valentine's request to obtain personnel records of his prosecuting attorney, the balance must tip in favor of privacy." The Court was unaware, nor had it been enlightened, as to "how such request would advance the public's interest in assuring that the agency in question was properly performing its function.

The Court upheld the decision of the trial court to deny the request.

Central Kentucky News-Journal v. Hon. Douglas M. George (Judge, Taylor Circuit Court)
306 S.W.3d 41 (Ky. 2010)

FACTS: The Kentucky News-Journal was seeking copies of documents related to a confidential settlement entered into between the Campbellsville Independent School District, the Board of Education and related parties, and an employee alleging sexual harassment. After mediation, the parties reached two separate settlements in which both agreed the terms would remain confidential, and the Taylor Circuit Court agreed to seal the records. The News-Journal requested the documents from the involved school districts under the Kentucky Open Records Act, and was denied.

The News-Journal appealed to the Kentucky Attorney General. In its Decision, 07-ORD-110, the Attorney General rendered an opinion that the settlement agreements were public documents and subject to disclosure, but that because of the court order, "its authority was limited and the issue of public access to the agreements was one to be resolved by the court." As such, the News-Journal intervened in the actions to request the trial court to unseal the agreements and make related orders. The trial court denied the motion and the newspaper further appealed to the Court of Appeals for a writ of mandamus.

The Kentucky Court of Appeals ruled that pursuant to Courier-Journal and Louisville Times Co. v. Peers[70] that the news media "was entitled to intervene and participate in a hearing on the underlying merits of its claims." It ordered the trial court to allow the intervention, but ruled that neither the Open Records Act's privacy exemptions, nor the First Amendment, required the court to unseal the agreements.

[70] 747 S.W.2d 125 (Ky. 1988)

The News-Journal returned to the Court of Appeals, which denied its motion. The News-Journal further appealed.

ISSUE: Are settlements of lawsuits against public entities confidential?

HOLDING: No

DISCUSSION: The Court concluded that "because … settlement agreements involved the expenditure of public funds, the public's interest in the outcome of the settlement was … strong." The interest of a plaintiff in keeping the amount secret was of little weight. The Court agreed that a "confidentiality clause" does not "create an inherent right to privacy superior to and exempt from the statutory mandate for disclosure" under Open Records.

The Court reversed the decision.

SIXTH CIRCUIT

ARREST

Wolgast v. Richards
2010 WL 3119525 (6th Cir. 2010)

FACTS: As noted in the trial court opinion:

> At 10:27 p.m. on May 29, 2004, central dispatch for the Tawas Police Authority ("TPA") in Tawas, Michigan, received a telephone call from a male who stated that the Crossroads Bar & Grill ("Crossroads") was going to "blow tonight," and then the man hung up the phone. The exact content of the call, as later transcribed, was as follows:
>
> There's a place in Tawas City called the Crossroads [sic]. That place is going to f***ing blow tonight. Nobody'll f***ing believe me. It's going to blow tonight.
>
> The call, which was made from a pay phone near Freel's Market ("Freel's"), was interpreted as a bomb threat. Plaintiff's son was employed by Freel's and he worked at that location the night in question, with his shift ending at approximately 9:00 p.m. Defendant Richards contacted Officer Mark Ferguson ("Officer Ferguson") and together they proceeded to the area near the market where the pay phone is located. No one was near the phone and the officers were unable to locate anyone who had observed any recent use of the phone.
>
> Since the officers were aware that Plaintiff Jeffrey Wolgast had made calls to TPA central dispatch complaining about excessive noise from Crossroads in the past, they suspected Plaintiff may have made the bomb threat as well. The officers' summary report indicates that after the officers did not locate anyone at the payphone, Defendant Richards called the TPA central dispatch and asked them to "pull up prior calls made by the Wolgast's [sic] and see if they sounded the same." The incident report goes on to say that "[Defendant] Richards was then advised, by Dispatcher Golimbiewski, that Dispatcher Soroka stated that it did sound like one of the Wolgast's [sic]." The report also notes that "Dispatcher's [sic] Golimbiewski and Soroka are the midnight crew at Central Dispatch and has [sic] talked to the Wolgast's [sic] on numerous occasions when they have called in regarding loud Music at Cross Roads."
>
> The officers proceeded to Wolgast's residence, where they questioned Wolgast, his wife, and his son, all of whom denied making the call. The officers indicated to Wolgast and his family that they would be sending tapes of Wolgast's previous phone complaints and the tape of the bomb threat to the Michigan State Police crime lab for voice analysis and that, if the voices matched, Wolgast would be charged with a felony. Although initially considered a suspect, Wolgast's son, who had also complained about the noise at Crossroads in the past, was eliminated

from suspicion by the officers after his mother stated that her son was home at the time the call was made.

Defendant Richards prepared an incident report that detailed his findings. The report documented his conversations with Wolgast, his wife, and his son. In pertinent part, the report stated:

[Defendant] Richards spoke to [Wolgast] after speaking to [Wolgast's wife] and [son]. [Wolgast] admitted that he was out on a bicycle ride and that he had ridden down US-23 past Freel's Market. [Wolgast] stated that he returned home from his bicycle ride approximately twenty to twenty five minutes prior to Officers [sic] arrival. *It should be noted that the call came in at 10:26 p.m. and Officers arrived at [Wolgast's] residence at [10:41 p.m (actually 10:31)].*[71] [Wolgast] claimed that he did not call 911 from the pay phone and that if it was him, he would just [sic] called from his own residence. [Defendant] Richards advised that the caller was on tape and that it would be sent to the lab to be compared to [Wolgast's] prior complaints about Cross Roads. [Defendant] Richards then asked [Wolgast] what the outcome of the tapes would be and [Wolgast stated] that it would come back as not being his voice. (*emphasis in original*). Sometime after Defendant Richards instigated the investigation, he left the department for a position with the Michigan State Police. As a result, Defendant Parent continued the investigation.

More than two months later, on August 4, 2004, a warrant was issued for Wolgast's arrest. The affidavit in support of the arrest warrant was signed and submitted by Defendant Parent. Defendant Richards, however, drafted both the police report and the affidavit signed by Defendant Parent. The affidavit states:

1. This incident occurred on 05-29-04 at approximately 10:26 p.m. This incident occurred at 1139 W. Lake St. (Freel's Market payphone), City of Tawas City, County of Iosco, State of Michigan.
2. Bomb Threat: At 10:26 p.m. Central Dispatch received a 911 call stating that there was a place in Tawas City by the name of Cross Roads and that it was going to blow, that it was going to blow tonight. The caller then hung up the phone.
3. Dispatcher Soroka works the midnight shift and has taken several phone calls from Wolgast in the past. Cpl. Richards was advised that the caller of the bomb threat sounded as [sic] the same as Wolgast.
4. Evidence: Copy of bomb threat, prior calls made by Wolgast and radio/phone traffic between Central Dispatch and Cpl. Richards. It should be noted that Wolgast calls into Central Dispatch numerous times a month concerning loud music at Cross Roads Bar and Grill.
Cpl. Richards has listened to the prior calls made by Wolgast and the actual bomb threat.2 Cpl. Richards believes the caller to be the same on all the calls.

[71] The district court pointed out in a footnote that while the report states that the officers arrived at 10:31 p.m., subsequent testimony indicated that there had been a typographical error. The parties agreed on this point.

> *5. The suspect is Jeffrey Allen Wolgast, w/m, DOB: 11-14-56. Cpl. Richards spoke to Wolgast at his residence, on 05-29-04. Wolgast stated that he was out on a bicycle ride at the time the 911 call came in, and had ridden his bicycle by Freels Market. Wolgast stated that he did not make the bomb threat.*
>
> Police arrested Wolgast on August 16, 2004, for violation of Michigan Compiled Laws 750.411a, false report or threat of bomb, a felony carrying a maximum punishment of four years in prison and a $2,000 fine. The county dismissed the charge on September 28, 2004, the day on which the preliminary examination was scheduled to take place, because, according to the Complaint, the dispatchers could not identify Wolgast's voice.

Wolgast filed suit against the officers and other parties, claiming wrongful arrest, false imprisonment and retaliatory prosecution. The Court ultimately, after detailed proceedings, granted summary judgment to Officer Parent but not to Officer Richards, finding that some of the misstatements in the affidavit were made with reckless disregard for the truth.

Specifically, the Court stated:

> The report and recommendation focused on four alleged misstatements and found that a factual dispute existed as to whether the misstatements included in the affidavit were false. First, the affidavit stated that "[Wolgast] stated that he was out on a bicycle ride at the time the 911 call came in, and had ridden his bicycle by Freel's Market." Wolgast denies that he drove by Freel's, and Defendant Richards acknowledged that Wolgast did not state that he rode directly past Freel's. Defendant Richards contends that it is not a material misstatement because the inference is that Wolgast's route took him into the vicinity of Freel's. Though Defendant Richards offers a reasonable explanation, the fact that he attributes that statement to Wolgast raises a triable issue of fact.
> Additionally, the report indicated that Wolgast stated that he returned home 20-25 minutes before the police arrived. Considering that the police arrived at 10:41 p.m. and the bomb threat was made at 10:26 p.m., the statement contained in paragraph five of the affidavit, that Wolgast was riding his bike at the time of the bomb threat, is inaccurate. Defendant Richards contends that his subjective belief that these statements were truthful indicates that he did not act with reckless disregard for the truth. This ignores the fact that the affidavit directly attributed the statements to Wolgast.
>
> Next, [Magistrate] Judge Binder concluded that the statement that Wolgast called dispatch numerous times a month, when in fact it appears that he called about once a month, is immaterial. Though the dispute is unaddressed by Defendant, the Court agrees with Judge Binder's conclusion, that the difference between numerous times a month and once a month, is an immaterial distinction.
> Third, Judge Binder found that the inclusion of Defendant Richard[s'] personal opinion that the voice on the bomb threat was the same as Wolgast's voice established a factual dispute, because Defendant Richards compared the tape with recordings of both Wolgast and Wolgast's son. The Court disagrees with the

magistrate judge's conclusion. Assuming that Defendant Richards listened to voice exemplars from Wolgast and Wolgast's son, there is no indication that his opinion was intentionally or knowingly inaccurate. Furthermore, Wolgast has not demonstrated any evidence that the inclusion of Defendant Richards' statement, that he believed the voice on the 911 call to be that of Wolgast, was made with reckless disregard of the truth. As the magistrate judge noted, the possibility that Defendant Richards listened to tapes of Wolgast and Wolgast's son "reveals, at most . . . a negligent voice identification technique." Thus, Wolgast has not met his burden establishing a factual dispute with respect to this statement and the Court rejects the magistrate judge's recommendation.

Finally, Judge Binder found the statement concerning the dispatcher's voice identification of Wolgast creates a triable issue, because impeachment evidence exists that indicates the dispatcher believed that Wolgast was not the caller. The affidavit stated that "Dispatcher Soroka works the midnight shift and has taken several phone calls from Wolgast in the past. Cpl. Richards was advised that the caller of the bomb threat sounded the same as Wolgast[."] Prior to the dispatcher's deposition, Wolgast recorded the dispatcher stating that she did not believe that Wolgast was the caller at the time of the bomb threat. The dispatcher's deposition contradicted this assertion. The magistrate judge's report discussed whether the recorded statement, as impeachment evidence, is legally sufficient to create a triable issue of fact.

Defendant Richards contends that this possible impeachment evidence is not sufficient to survive summary judgment. Wolgast has not indicated any admissible evidence indicating that Defendant Richards['] inclusion of the statement that Dispatcher Soroka stated that the voice on the 911 call sounded like Wolgast was done with reckless disregard for the truth. Nor has Wolgast demonstrated with admissible evidence that the statement itself is not true. Thus, the Court disagrees with the magistrate judge on this point.

Finally, Defendant Richards objected to the report and recommendation contending the magistrate judge erred in finding that the alleged misstatements discussed above establish a triable issue of fact. Though Wolgast has a "heavy burden" in establishing that the statements were made with reckless disregard for the truth, the clear discrepancies between the affidavit and other admissible evidence establish triable issues of fact. Though the Court disagrees with the magistrate judge's conclusions with respect to some statements included in the affidavit, the Court does agree with Judge Binder's ultimate conclusion that the affidavit's statements regarding the timing and route of Wolgast's bike ride reveal a genuine issue of fact that the statements in the affidavit were made with reckless disregard for the truth.

Richards appealed.

ISSUE: Is an arrest supported by a questionable voice identification valid?

HOLDING: No

DISCUSSION: The Court noted that at this state of the proceeding, it could not consider arguments "that rely on disputed facts, like his being informed that Dispatcher Dawn Soroka thought the caller was 'Wolgast' by the caller's voice, and Soroka's familiarity with Wolgast's voice based upon past calls."

However, the Court noted that a "credible voice identification can be sufficient to establish probable cause; a voice identification based on little familiarity may not be." The Court affirmed the trial court's ruling on the issue.

The Court upheld the denial of summary judgment on Richards' behalf at this stage of the proceedings.

SEARCH & SEIZURE - SEARCH WARRANT

U.S. v. Howard
621 F.3d 433 (6th Cir. 2010)

FACTS: As a result of a traffic stop on December 12, 2005, in Bradley County, Tennessee, Bautista-Benitez's vehicle was searched. Over 5 kilos of drugs were found, along with two cell phones. Howard was drawn into the case and a drug dog was summoned and alerted on Howard's vehicle. The investigation led to a residence in Crittenden, Kentucky, which encompassed two trailers with a common driveway, a locked gate and single mailbox bearing the address 15712.

Agent Hardcorn (Northern Kentucky Drug Task Force, prepared a warrant with the following description.

> ***On or in the premises numbered:***
> *15712 Carlisle Road*
> *Crittenden, KY 41030*
> *Kenton County*
> ***More particularly described as:*** *A singlewide trailer, which is white in color with brown trim. The trailer has two entrances, both facing toward Carlisle Road. The front door is facing a brown barn. A brown metal pole barn is attached to the white trailer with several additional wooden structures by the pole barn. A mailbox with the numbers "15712" clearly posted on it is located across the street from the described property. Additionally, there is another single family trailer located approximately 100 yards to the right of the above described pole barn. This trailer is white in color with the front door facing toward Carlisle Road. The roof is dark in color with wooden steps going to the front door. All of the buildings described here are located on the property of 15712 Carlisle Road.*

Digital scales and an electronic money counter was found in one of the two mobile homes. However, it was then discovered that the numbers on the address provided was in fact incorrect.

Bautista-Benitez and Howard were both indicted. Howard was convicted and appealed.

ISSUE: Does a minor error of address on a search warrant invalidate the warrant?

HOLDING: No

DISCUSSION: With respect to the search warrant, the Court found the facts detailed to be sufficient to prove probable cause. Although Howard argued that the two mobile homes in fact had separate addresses, the court found the "minor, technical inaccuracy" to be insufficient to overturn the warrant.[72]

Howard also argued that he was entitled to federal funds to allow him to hire an expert to challenge the drug dog's alert. The Court agreed it was "venturing into relatively uncharged waters because the caselaw" on the issue was sparse. The Court noted that the "ability of dogs to detect the odor of narcotics is uncontroverted." As such, an expert was not needed for that purpose. But the Court agreed, "at least four other aspects of a drug-dog's alert that could present circumstances where expert assistance is 'necessary to mount a plausible defense.'"

The Court noted that, first, the dog's health might be challenged, but that did not seem at issue in this case. Second, the dog's certification might the challenged, but again, no such showing was made in this case that the dog's certification was questionable. Third, the adequacy of the dog's training or performance, specifically, might be at issue, but, the Court agreed that "it viewed expert testimony offered to disprove the reliability of drug dogs *generally* as having little value when determining the reliability of a *particular* drug dog."[73] The credibility of a drug dog "rests almost entirely on the credibility of the dog handler's testimony "[b]ecause the handler is the only witness who can speak to the subjective interaction during a particular dog alert."[74] Ultimately, the Court agreed that his criticism of the dog's records were not such that Howard needed expert assistance to challenge the dog's credibility. Finally, the Court agreed an expert might be needed "if the drug-dog alert at issue was ambiguous or the product of abnormal circumstances." Since drugs were found, the dog's alert was obviously accurate.

The Court agreed a drug dog expert was not warranted in this case.

With respect to suppression of the evidence found in the mobile home, Howard based his demand on the exclusionary rule. The Court explained in Murray v. U.S.[75] that:

> … [t]he exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search. Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint.

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[72] U.S. v. Pelayo-Landero, 285 F.3d 491 (6th Cir. 2002); U.S. v. Durk, 149 F.3d 464 (6th Cir. 1998).
[73] U.S. v. Diaz, 25 F.3d 392 (6th Cir. 1994) U.S. v. Torres-Ramos, 536 F.3d 542 (6th Cir. 2008).
[74] U.S. v. Howard, 448 F. Supp. 2d 889 (E.D. Tenn. 2006).
[75] 487 U.S. 533 (1988)

There are, however, expectations to the general rule. The first is the independent source doctrine, which "rests on the proper balance to be struck between the 'interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime." Second, the Court addressed the inevitable-discovery doctrine. In Nix v. Williams[76], the Court ruled that "[s]ince the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." If "the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings." Since Howard's "purported consent to search the Suburban was … tainted by his unlawful arrest," evidence found there should be suppressed unless an expectation applies.

The prosecution argued that the dog's alert constituted an independent source for the search, because the officer's had reasonable suspicion to justify the use of the dog. In this case, the officers had reasonable suspicion of Howard's involvement. The duration of the detention was reasonable and the wait for the dog was appropriate. The Court looked to U.S. v. Garcia[77] and agreed that even if the manner he was detained rose to the level of an arrest, "the officers' display of authority and use of force to detain him did not create the circumstances that led to Titan [the dog] sniffing the Suburban." The dog's deployment was entirely independent.

The Court agreed that the alert of a properly trained drug dog was sufficient probable cause, in itself, to support the search of the Suburban. The handler had testified extensively as to the dog's training, which the court found adequate.

Howard's conviction was affirmed.

U.S. v. Tatman
2010 WL 3724593 (6th Cir. 2010)

FACTS: In February, 2006, Tatman and his wife, Taresa, were separated. She had moved all her belongings from their residence in Chillicothe, Ohio, except for a single disputed item. She returned to the house on Feb. 4 and threatened to turn Tatman over to the authorities for illegal weapons unless he gave her the house. He agreed to do so, but eventually, they got into an altercation and Tatman removed her from the house and ripped the phone from the wall. "Taresa then went to a local general store and called the police alleging domestic violence." Deputy Clark (Ross County SO) met her in the parking lot with her cousin, Fletcher, with whom she had been living.

The officers decided to go to the house and arrest Tatman. He did not answer the door, however. They fetched Taresa and she agreed to unlock the door, and as soon as she did so, the deputy encountered Tatman. Taresa consented to the entry, but Tatman "immediately objected to Taresa's and Clark's entry and told Clark that Taresa did not live there and had no right to be there." After a discussion, Tatman agreed to leave and went upstairs to get some belongings.

[76] 467 U.S.431 (1984).
[77] 496 F.3d 495 (6th Cir. 2007)

Taresa told Deputy Clark about the weapons (which were fully automatic) and the deputy went upstairs, finding "finding three such weapons on a blanket on the floor." Tatman was arrested for domestic violence and secured in a cruiser. Taresa signed a written consent for the home and even showed Clark where weapons might be hidden. Eleven weapons were found. A third search was done two days later, pursuant to a warrant, and yet more fully automatic weapons, suppressors, silencers and related items were found.

Tatman was arrested some time later on federal weapons charges, and the agent requested consent to search for additional items and a fugitive believed to be on the property. Tatman gave written consent. More items were seized. Tatman was indicted on federal weapons charges and requested suppression. The Court granted the suppression and the government appealed.

ISSUE: May evidence found in an unlawful entry be used to support a later search warrant?

HOLDING: No

DISCUSSION: The Court looked to the first search under the doctrine of Georgia v. Randolph[78] and ruled that "Tatman's objection to Clark's entry trumped Taresa's consent" The Court noted that "Tatman's version of events was corroborated by sworn affidavits from Taresa and Fletcher and was consistent with the undisputed story of what had taken place earlier that night—Tatman had physically removed Taresa from the house after she threatened to report his possession of illegal guns to the police." The question remained, however, as to "whether Tatman's objections to Clark's entry invalidated Taresa's consent for the police to enter Tatman's home and arrest him." The Court found that Tatman "clearly and unequivocally objected to the police officer's presence before the search began." Further, a "person who consents to a warrantless search has the right to restrict the scope of the search."[79]

The Government tried to argue that "the search was legal because it was a search incident to a lawful arrest." This argument fails because the arrest was not legal; although Clark may have had probable cause to arrest Tatman for domestic violence, Clark was not permitted to enter Tatman's home to arrest him without a warrant or exigent circumstances.[80] The next argument, that since Tatman was arrested at the time he went upstairs, that the arresting officer could stay with him, but the court agreed "Clark's entry into the house to arrest Tatman violated the Fourth Amendment" and "as both Clark and Tatman testified, Clark did not place Tatman under arrest until after they both were upstairs." Finally, the government argued that the search was justified by exigent circumstances, but the Court noted, Clark did not know about the weapons until he entered the house illegally. Further, "[e]vidence that firearms are within a residence, by itself, is not sufficient to create an exigency."[81] Tatman was cooperative so there was no exigency concerning the weapons. The Court uphold the suppression of the items found in the first search.

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[78] 547 U.S. 103 (2006).
[79] Florida v. Jimeno, 500 U.S. 248 (1991).
[80] *See* Kirk v. Louisiana, 536 U.S. 635 (2002); Payton v. New York, 445 U.S. 573 (1980).
[81] U.S. v. Bates, 84 F.3d 790 (6th Cir. 1996).

With respect to the second search, Tatman argued that "Taresa's consent was not voluntary and, even if her consent had been voluntary, she no longer had apparent authority to consent to the search." The court agreed that under the circumstances, "Taresa signed the consent form in the middle of the night, after the domestic dispute with Tatman, and just after Tatman was taken in handcuffs into the back of a police cruiser. Under these circumstances, it seems quite likely that Taresa did not even read this statement contained in the consent form, let alone intelligently consider its meaning." The government failed to meet its burden that her consent "was given intelligently and voluntarily." Taresa invoked the Fifth Amendment and did not testify, but did submit an affidavit as follows: "[T]he young deputy presented me with a paper and told me it would be in my best interest to sign it because it would allow them to enter the residence and search it and would protect me from being involved and losing my home." Fletcher submitted a similar affidavit. The Court agreed her consent was not voluntary and further, "the circumstances surrounding the second search created ambiguity such that Clark had a duty to further inquire into Taresa's authority to consent to the search of the house before conducting a search in reliance on her consent." "When police are conducting a search pursuant to a person's consent and circumstances arise that create ambiguity as to whether the person who consented actually had authority to consent to the search, the police have a duty to take affirmative steps to confirm that the person who consented actually had such authority."[82] The Court agreed that "therefore, even if Taresa had consented to the second search voluntarily, this consent could not provide the basis for a valid warrantless search because Tatman's statements sufficiently undermined Taresa's apparent authority to consent to a search of the house, such that Clark was required to make further inquiry into the issue.

With respect to the search pursuant to the warrant, the Court reviewed the warrant, which read:

> *1. The Affiant [sic] is a ten-year veteran of law enforcement and is currently assigned as a Detective within the Ross County Sheriff's Office Detective Division. The Affiant received initial training through the Ohio University Southern Ohio Police Officer Training Academy and has received advanced training through the Ohio Police Officer's Training Academy.*
> *2. On February 4, 2005, the Ross County Sheriff's Office was summoned to 401 Tabernacle Rd. reference [sic] a complaint of Domestic Violence. The responding Deputy obtained information from the victim and an arrest was made stemming from the complaint.*
> *3. While at the scene, the Deputy was advised by the victim that the suspect was in possession of fully automatic firearms. The victim gave consent and a search was conducted for the alleged firearms.*
> *4. During this search a number of non-registered fully automatic weapons were discovered, these weapons where [sic] concealed in the attic of this residence. Also a number of other weapons were located throughout this residence.*
> *5. While checking the non-modified weapons it was discovered and confirmed that one weapon had been reported stolen from Clark County Ill [sic] in 1996 This weapon is described as being a Diawa .12 gauge shotgun. Confirmation of this stolen weapon was obtained from law enforcement from Ill.*

[82] Illinois v. Rodriguez, 497 U.S. 177 (1990); U.S. v. Waller, 426 F.3d 838 (6th Cir. 2005).

> *6. Affaint [sic] additionally discovered technical drawings and instructions to assist in the conversation [sic] of semi automatic weapons to fully automatic weapons.*
> *7. Affaint [sic] later learned that a workshop had been used to manufacture and alter parts and weapons to convert them into fully automatic weapons.*

The Court agreed that the majority of the information in the affidavit was tainted "because it was obtained during the previous illegal searches." As such, the "[t]he critical question to be determined is whether the affidavit, apart from the tainted information that is either inaccurate or illegally obtained, provides the requisite probable cause to sustain a search warrant."[83]

After removing the tainted portions from the warrant, the Court was left with insufficient information to support the warrant. Taresa's representations about the weapons, and she was unnamed in the warrant, is as "an informant and no independent corroboration of the information she provided was available."[84] In addition, an assertion that Tatman owned such weapons did not necessarily mean the weapons were located at the house. The Court agreed that the untainted facts were "were too vague, generalized, and insubstantial to establish probable cause."[85] The Court upheld the suppression of the warrant, and further agreed that the fruits of the search were not admissible under the inevitable-discovery doctrine."

Finally, with respect to Tatman's later consent, which resulted in the seizure of a single item, a gun parts kit, the Court agreed that it was properly suppressed "because [the item] was not immediately incriminating and, therefore, its seizure was not permitted under the plain view doctrine." Specifically, the agent who seized the item admitted that "that he was not able to determine whether or not they were illegal before doing so." He took photos and sent them to the firearms technology branch for identification. "These firearms experts determined that, among the items seized, the CZ-26 parts kit was considered an illegal machine gun because "it was readily convertible to be made into a machine gun." The Court agreed the agents did not exceed the scope of Tatman's consent, but that did not necessarily permit the seizure of the gun parts. "The Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.'"[86]

Specifically:

> Tatman's consent permitted the ATF agents to look in the box where they discovered the gun parts and obviated any concerns about the officers interfering with Tatman's expectations of privacy in doing so. However, in order for the gun parts to have been *seized* lawfully, the requirements of the plain view doctrine must be satisfied.[87] Under this doctrine, law enforcement officers are permitted to seize evidence without a warrant if the evidence is "'(1) in plain view; (2) of a character that is immediately incriminating; (3) viewed by an officer lawfully located

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[83] U.S. v. Hammond, 351 F.3d 765 (6th Cir. 2003) (citing U.S. v. Charles, 138 F.3d 257 (6th Cir. 1998)).
[84] U.S. v. Allen, 211 F.3d 970 (6th Cir. 2000) (en banc); U.S.v. Higgins, 557 F.3d 381 (6th Cir. 2009).
[85] U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004) (en banc).
[86] U.S. v. Jacobsen, 466 U.S. 109 (1984)"
[87] See Soldal v. Cook County, Ill. , 506 U.S. 56 (1992) (noting the applicability of the plain view doctrine to consensual searches); U.S. v. Flores, 193 F. App'x 597 (6th Cir. 2006) (finding that a gun found during a consensual search was seized properly because it satisfied the conditions of the plain view doctrine).

> in a place from where the object can be seen; and (4) seized by an officer who had a lawful right of access.'" [88] The parts were not immediately incriminating.

Further, "although O'Brien admitted to never asking Tatman for consent to take the gun parts for testing, he apparently was under the impression that Tatman's signing of the form meant that '[he] could take any property.'" He was mistaken. The consent form simply stated that Tatman "underst[ood] that any contraband or evidence of a crime found during the search can be seized." The Court upheld the suppression of the gun parts.

U.S. v. Sneed
385 Fed.Appx. 551, 2010 WL 2836334 (6th Cir. 2010)

FACTS: On May 3, 2007, a bank robbery occurred in Pickerington, Oho. A vehicle and license plate were obtained by witnesses. The FBI found the vehicle to belong to Castro, and upon questioning, she indicated her brother, Sneed, had borrowed it that day and returned it. She changed that story later, however, but eventually agreed he had the vehicle on May 3. A similar bank robbery had occurred about a week earlier and Castro also confirmed Sneed had the car that day.

The agents obtained a search warrant for the car and found evidence linking the vehicle to the robbery. Upon further investigation, the agents learned that Sneed lacked a real, permanent residence, although he listed his sister and his mother's home with his employer. They sought to interview Sneed at work and found a vehicle they had discovered was registered to him in the parking lot. However, he apparently fled his workplace and never returned to clock out or retrieve his vehicle. (Evidence later indicated he owned a second car.) That vehicle was towed and a warrant was sought to search it.

Continuing:

> The affidavit stated that witnesses to the Sky Bank robbery observed two black males exit the bank and enter a Honda Accord, driven by a third black male, with Ohio plate number DWN 2893. The affidavit also stated that the vehicle was registered to Virginia Castro and that an interview with Castro revealed that Castro's brother, Dante Sneed, had access to the Honda Accord. In addition, [a witness's] affidavit noted that a suspicious-looking male entered Sky Bank in the hours leading up to the robbery, identified himself as "Dante," and asked questions about money orders. Surveillance video revealed the suspicious-looking male to be Dante Sneed. Specifically in regards to Sneed's Cadillac, the affidavit stated that the vehicle in question was registered to Dante Sneed, per Ohio motor vehicle records. The affidavit then went on to state the following:
>
> *13. On 5/4/2007, Castro, Sneed's sister, stated that Sneed did not live at 2259 New Village Road, but instead lived in many different places. Castro did not know the exact address where Sneed stays, because it changes nightly.*

[88] Shamaeizadeh v. Cunigan, 338 F.3d 535 (6th Cir. 2003) (citing U.S. v. Roark, 36 F.3d 14 (6th Cir. 1994)).

14. On 5/16/2007, at approximately 10:15 pm, agents went to the Greyhound terminal to interview Sneed. Upon arrival Sneed's vehicle, Ohio Registration EBT-6523, a four door, black in color, Cadillac, was seen in the Greyhound parking lot. Agents parked their vehicles next to Sneed. Greyhound management advised that Sneed had clocked in at 9:56 pm. Greyhound management attempted to find Sneed, even paging him over the loud speaker. Sneed did not respond. Agents and Columbus Police Department officers searched the entire terminal for Sneed but he had fled the premises. A CPD officer saw a black male, matching the height of Sneed and having similar clothing to what Sneed was wearing, walking on 4th Street away from the Greyhound terminal. Agents and CPD officer's [sic] surrounded Sneed's vehicle. It is believed that Sneed did not return to the vehicle in hopes of disassociating himself from the car and its contents.

15. On 5/17/2007, Greyhound management confirmed that Sneed never returned to work to clock out.

16. Due to Sneed having abandoned his job and his vehicle agents seized the vehicle for safe keeping. Furthermore, as Sneed does not have a full time residence it is the belief that evidence of the Sky Bank robbery may be in Sneed's vehicle.

17. Your affiant believes there is sufficient probable cause to search the 1996 Cadillac, four door Vin#: 1G6KD52Y4TU214423, with Ohio registration EBT-6523.

The warrant was issued and a gun and other items that linked Sneed to the robberies was found in the car. He was indicted and moved for suppression. "He argued that the warrantless seizure of his Cadillac was not supported by exigent circumstances and that the search warrant affidavit did not establish probable cause to believe that evidence from the robberies would be located in the vehicle." The Court, however, "determined that a warrant was not necessary to seize the Cadillac, so long as the agents had probable cause to believe that it contained contraband" while agreeing that the affidavit did, in fact, provide sufficient probable cause.

Sneed was convicted and appealed.

ISSUE: May probable cause support the search of a vehicle for fruits of a crime when the owner lacks a fixed address?

HOLDING: Yes

DISCUSSION: "Sneed challenges the search warrant affidavit for failing to establish the required nexus between his Cadillac and evidence of the bank robbery. He does not contend that probable cause was lacking to establish his involvement in the bank robbery. Nor does he challenge the veracity of the information contained in the affidavit." The Court looked to whether the affidavit established a "sufficient 'nexus between the place to be searched the evidence to be sought.'"[89] "It is not enough that the owner of the property is suspected of a crime; rather, the affidavit must show reasonable cause to believe that contraband sought will be found in the property to be searched. The Sixth Circuit, along with numerous other Circuits, has consistently held that a nexus can be inferred based on the nature of the evidence sought and the type of offense that the defendant is

[89] 594 F.3d 488 (6th Cir. 2010)

suspected of having committed."[90] The Court found it be a close call, but that there were sufficient facts to meet the nexus requirement. Since the evidence indicated that his address changed nightly, it was certainly reasonable to infer that anything of value might be kept in his vehicle.

Even if the warrant was not sufficient, the Court did find it would uphold the search under the Leon good faith exception.[91] In such cases, the "objectively reasonable reliance standard requires less than the showing required for probable cause." Leon does not apply only when (1) when the affidavit contains a known or reckless falsity; (2) when the magistrate who issued the warrant wholly abandoned his or her role; (3) when the affidavit lacks an indicia of probable cause such that reliance on it is objectively unreasonable; and (4) when the warrant is facially invalid such that it cannot reasonably be presumed valid." In this case, the Court found the affidavit to be far more than "bare bones."

Sneed's conviction was affirmed.

U.S. v. Ferguson
385 Fed.Appx. 518, 2010 WL 2776834 (6th Cir. 2010)

FACTS: Ferguson was arrested for drug trafficking on a state search warrant, on his property in Bowling Green. He moved for suppression and was denied. He was ultimately convicted and appealed.

ISSUE: Must a warrant prove a nexus with the location to be searched?

HOLDING: Yes

DISCUSSION: The Court began:

> Detective Craig Sutter, an officer who was assigned to the drug task force involved in the investigation, stated in his affidavit in support of the application for the search warrant of the Mt. Lebanon Church Road residence that he and several officers arrived at 2946 Mt. Lebanon Church Road, Bowling Green, Kentucky, at approximately 8:30 a.m., on May 15, 2006, to execute a federal arrest warrant for Ferguson. Sutter knocked on the front door, but no one answered. Sutter heard music coming from the residence and saw someone peer through the blinds of a front window.
>
> Sutter also observed two pieces of mail bearing Ferguson's name in plain view inside a black Ford Explorer associated with Ferguson that was parked in the driveway. The officers waited approximately forty-five minutes before leaving.
>
> The affidavit further stated that at about 10:10 a.m., dispatch received a phone call from Corey Ferguson's neighbor at 3013 Mt. Lebanon Road, and that "[t]his neighbor *advised that she saw Corey Ferguson* leave 2946 Mt. Lebanon Road in a red Dodge pickup truck that was towing a trailer." (*Emphasis added*.) Sutter attested that at 10:17 a.m. another trooper stopped the red pickup and that Corey

[90] See U.S. v. Gunter, 551 F.3d 472 (6th Cir. 2009); U.S. v. Williams, 544 F.3d 685 (6th Cir. 2008).
[91] U.S. v. Leon, 468 U.S. 897 (1984); U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004) (en banc).

> Ferguson was in this vehicle. The trooper placed Ferguson under arrest, and during a search incident to arrest, the trooper found a 12 gauge shotgun shell in Ferguson's pants pocket. The affidavit noted that Ferguson was a convicted felon, and that the affiant knew Ferguson to be engaged in drug trafficking. Lastly, Sutter stated that based on his experience and training, he knew that drug traffickers are frequently armed and often maintain firearms in their homes.

A search warrant was signed that authorized seizure of firearms and ammunition. While executing it, the officers also found over $5,000 in cash and related items. The trial court ruled the warrant was supported by the discovery of Ferguson in illegal possession of ammunition just minutes after leaving the premises listed in the warrant. The Court, however, noted that it is not unlawful for a felon to possess ammunition. Further, the neighbor indicated only that an unidentified black male entered the truck, they did not identify Ferguson. "This inaccuracy is material because it was the key fact connecting Ferguson to the residence during the relevant time period, and therefore linking the shotgun shell to the suspected possession of firearms in the residence."

The court found "the facts connecting criminal activity to the Mt. Lebanon Road residence are scant." However, the Court found the error, if any, to be harmless, in the face of the other overwhelming evidence against Ferguson. With respect to the items seized, the Court agreed that "the cash, the safe deposit key, the four surveillance cameras, and the JVC television were outside the scope of the search warrant." The Court, however, found that the incriminating nature of the items was not apparent, so it was improper to seize the items on plain view. The Court did permit the initial seizure of the cash, since it agreed it was in close proximity to the drug trafficking actions. However, the court noted that the alternate explanation Ferguson posed, the nature of the money and its location (in a piggy bank of some kind) was feasible and overturned the forfeiture.

U.S. v. Whisnant
2010 WL 3199689 (6th Cir. 2010)

FACTS: In February, 2007, Johnson, Whisnant's ex-wife, disappeared. Because of their tumultuous relationship, Whisnant was identified as a suspect. Officers obtained a search warrant for the body on his property, as well as for other items.

Capt. Jeffers (Scott County TN SO) noticed drywalling material on the porch, and a newly touched up area of a wall inside. Realizing the picture was hanging over the area might have been hung to conceal evidence, he removed it, finding a recently patched wall. He poked a small hole and saw "rolls of cloth." They enlarged the hole and found numerous soft gun cases. Because Whisnant had a history of bomb-making, they enlisted the aid of the bomb squad. The items inside the wall were removed and found to be guns, ammunition and bomb-making materials. More components of a Sten machine gun were also found in the house.

Whisnant was indicted for being a felon in possession. He was indicted and requested suppression, which was denied. Shortly thereafter, Det. Anderson, who had worked on the case, was found to have "engaged in professional misconduct unrelated to this case." A second hearing was held, excluding Deputy Anderson. The trial judge agreed that the "officers reasonably made access into the wall." The motion was denied. Whisnant was convicted and appealed.

ISSUE: May a residence be lawfully damaged during a valid search?

HOLDING: Yes

DISCUSSION: Whisnant argued that "cutting holes in the interior walls of his house" exceeded the scope of the warrant. The Court agreed, however, that "[o]fficers executing search warrants on occasion must damage property in order to perform their duty."[92] Any damage would, of course, be subject to later judicial review if warranted. The warrant gave the officers the entire premises, and the evidence of recent patching made the actions of the police appropriate under the circumstances. The Court upheld the denial of the motion to suppress

Whisnant's conviction was affirmed.

U.S. v. Montgomery
2010 WL 3398794 (6th Cir. 2010)

FACTS: Montgomery was invoked in drug trafficking and investigated by the Hardin County Drug Task Force, although the ultimate purchase took place at Montgomery's residence at 1117 Plum Run Road in Bardstown, Kentucky, in Nelson County. He moved for suppression on several issues, including a complicated Speedy Trial Act issue. When that was denied, he was convicted and appealed.

ISSUE: May a warrant with an address error be considered valid?

HOLDING: Yes

DISCUSSION: Montgomery challenged the warrants on two issues. First, the judge that signed it had previously been a state prosecutor and he had participated in several prosecutions involving Montgomery and his family. The Court, however, found no bias on the part of the issuing judge. Montgomery also argued that the warrant lacked probable cause, and his argument was as follows:

> . . . concerning the 1117 Plum Run Road address, the warrant itself provided for the search of 1197 Plum Run Road. Three of the first four houses on Plum Run Road actually fit the description provided. The warrant was not sufficient as it failed to describe the location with sufficient particularity.

The government conceded the address was wrong. The Court agreed that the description was accurate, even with respect to automobiles in the driveway, and that it included a photograph. Therefore, "there was no reasonable probability that the executing officer might mistakenly search one of the other three houses on the street that fit the description of the premises to be searched." With respect to the other address searched during the case, his brief stated as follows:

> In the instant case, as relevant to the 106 Guiness Court address, the affidavit obtained was lacking any indicia of probable cause because it failed to contain

[92] Dalia v. U.S., 441 U.S. 238 (1979).

> sufficient evidence to establish that the drugs allegedly procured by the CI, actually came from 106 Guiness Court. The affidavit supporting issuance of the warrant is based upon speculation and unsupported by any material corroboration.

The Court agreed with the government, however, noting that:

> The affidavit, signed by the lead investigator, Detective Roby, stated that a confidential informant had purchased three ounces of crack cocaine from Montgomery on March 13, 2007. The CI had informed Detective Roby that Montgomery had left his residence with no crack cocaine in his possession, had traveled to 106 Guiness Court to obtain the crack cocaine, and then returned to his residence where the crack cocaine was sold to the CI. The affidavit recites that Montgomery was followed by the officer from his residence to 106 Guiness Court and back to his residence, and that he made no other stops, corroborating what the CI had told police.

Montgomery's conviction was affirmed.

U.S. v. Master
614 F.3d 236 (6th Cir. 2010)

FACTS: On January 14, 2007, Investigator Dyer (Franklin County, TN, SD) sought a search warrant for Master's home. The warrant indicated the address was in Franklin County but in fact, it is actually in Coffee County. The judge that signed the warrant was a Franklin County judge that could only sign for property within that county. A few months prior to the search, the Franklin County Sheriff's Office had responded to the address on an unrelated matter and made an arrest, which was subsequently dismissed because of the venue.

The warrant was executed. Since a gun was found, Master, a convicted felon, was arrested. The investigator later testified that he was told Master's address was in Franklin County, based upon his registration as a sex offender. The 911 center also indicated to him that it was in the Franklin response area. However, PVA indicated the address was in Coffee County. The Court declined to suppress the results of the search, and Master appealed.

ISSUE: Is a warrant signed by the wrong judge (out of jurisdiction) valid?

HOLDING: No

DISCUSSION: The Court framed the question as whether the lack of state authority is relevant to a federal prosecution. However, in this case, the warrant was not invalid because of an additional protection provided by Tennessee, but because it does not comply with the Fourth Amendment. The Court looked to U.S. v. Scott and concluded that if a warrant is signed by someone lacking the legal authority to do so, it is "void ab initio." The state was "allowed to delineate the scope of [the] authority of a judge."

The search clearly violated Master's Fourth Amendment rights. The government, however, argued that the search should be upheld under U.S. v. Leon's good faith provisions.[93] Given recent cases law, specifically Herring v. U.S.[94], the Court agreed it was no longer required to suppress such evidence and that the "decision to exclude evidence is divorced from whether a Fourth Amendment violation occurred." Since the lack of judicial authority would have no impact on police misconduct, it was permitted to balance the benefit of deterrence versus the cost of suppression. The Herring Court's "emphasis seems weighed more toward preserving evidence for use in obtaining convictions, even if illegally seized, than toward excluding evidence in order to deter police misconduct unless the officers engage in 'deliberate, reckless, or grossly negligent conduct.'"

The Court remanded the case for further examination and the balancing of interests required by Herring.

U.S. v. Silvey
2010 WL 3398837 (6th Cir. 2010)

FACTS: In March, 2008, the Buffalo Trace Regional Narcotics Task Force (BTRNTF) got an anonymous tip that "a Vietnam veteran living somewhere in Fleming County, Kentucky was cultivating marijuana inside his house." They were told he had automatic weapons. The officers were not given his name, but were told he lived "in a newly built home protected by a locked gate" which was "probably monitored by video cameras." In October, they received a second tip that provided Silvey's name and they learned his specific address. Neighbors stated that he "terrorized" them by firing what they thought were automatic weapons.

Officers collected a pair of garbage bags left outside the entrance to his home, and found fresh green marijuana clippings that had been pruned from live plants, along with a receipt that had his wife's name.

They sought a search warrant, and listed the search location as the "only dwelling" at the address. The warrant, specifically, did not list that Silvey resided at his address. The warrant was issued and executed. Silvey was at the house and he was taken into detention. They found an active growing operation and a "veritable armory's worth of firearms." He was handcuffed and questioned. He admitted that he grew the marijuana (for his own use) and that the guns were his.

He was released on bond. The next day, agents arrived for a second interview at his home. They confirmed that he had been given Miranda the previous day, and he repeated his admission from the day before, including that he was a convicted felon.

Silvey was indicted on gun and drug related offenses. He moved for suppression of the evidence and the statements, arguing that the search warrant was insufficient. He further argued that his statements were thus tainted and inadmissible. The trial court denied the motion and he took a conditional guilty plea. He then appealed.

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[93] 469 U.S. 897 (1984).
[94] 129 S.Ct. 695 (2009); see also Hudson v. Michigan, 547 U.S. 586 (2006).

ISSUE: Is good faith an available defense for an otherwise invalid warrant?

HOLDING: Yes

DISCUSSION: The Court began with the assumption that the warrant was, in fact invalid, and proceeded to the issue of good-faith reliance. The Court looked to U.S. v. Laughton, which held that good faith in a "subsequently invalidated warrant is impossible in four situations."

> (1) when the warrant is issued on the basis of an affidavit that the affiant knows (or is reckless in not knowing) contains false information; (2) when the issuing magistrate abandons his neutral and detached role and serves as a rubber stamp for police activities; (3) when the affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable; and (4) when the warrant is so facially deficient that it cannot reasonably be presumed to be valid.[95]

Silvey argued that the third provision applied in this case. As such, the question was whether the officers had a reasonable basis to believe the information supported the warrant.[96] The court agreed that it did, in that the information in the warrant – that the trash bag came from the suspect residence – could be inferred from the fact that the suspect residence was the only one on the lane. A reasonable officer could conclude that the affidavit established probable cause. Certainly it was possible that the bag "could have been flung out the window of a passing car, or it could have fallen off the back of a garbage truck." But "when it comes to probable cause, the name says it all; certainty is never required, only a fair probability."[97]

The Court affirmed the denial of the suppression motion.

SEARCH & SEIZURE – CONSENT

U.S. v. Burcham
2010 WL 3058389 (6th Cir. 2010)

FACTS: On January 19, 2002, Officers Brown and Kellum (Memphis, TN, PD) were patrolling when they were alerted that "other officers were searching for Burcham as a suspect in an aggravated assault involving a baseball bat." They had already heard that Burcham had stolen firearms in his possession. The officers looked for him, finding him sitting in his vehicle at a gas station with his girlfriend, Kinsella. The officers detained Burcham and found a bat, and arrested him for the assault. He was transported by other officers. Officers Brown and Kellum stayed at the scene talking to Kinsella about the stolen weapons. Eventually they ended up at a storage unit Burcham rented and discovered stolen weapons.

Burcham was charged with the weapons and sought suppression. When that was denied, he was convicted and appealed.

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[95] U.S. v. Laughton, 409 F.3d 744 (6th Cir. 2005).
[96] U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004).
[97] Leon, supra.

ISSUE: May a person with common authority over an area give consent to search that area?

HOLDING: Yes

DISCUSSION: The officers testified that they had heard Burcham had stolen guns and had them in a storage unit, and they even had been told where the unit was located. Kinsella agreed that she knew about the guns at the unit, and provided the access code and the keys and gave them written consent to search the unit. (She also gave a written statement about the guns.) Burcham, however, testified that Kinsella did not have the code or keys and that the officers must have gotten from his property at the jail, and argued that Kinsella lacked the authority to consent.

The Court agreed that "police may obtain consent to search a location from anyone having 'common authority over or other sufficient relationship to the premises.'"[98] Such consent may be by "apparent authority," as well.[99] The Court had no trouble finding that the officers had sufficient reasonable belief that Kinsella had authority to consent and noted that the manager made no effort to stop them (even though Kinsella was not on the lease) once he learned she had the key and the code.

The Court affirmed the denial to suppress and Burcham's conviction, as well.

U.S. v. Montgomery
621 F.3d 568 (6th Cir. 2010)

FACTS: On July 14, 2007, in the early morning hours, "someone hiding in the trees shot Montgomery in the back with birdshot or buckshot." He woke up his girlfriend, Ewing, who had passed out on the couch. She retrieved his rifle and he returned fire, while Ewing called 911. Officer Malone arrived and found Montgomery injured. He summoned EMS. "Malone noticed that Mongtomery had no trouble communicating, as did Officer Anthony Crawford, who arrived shortly after Malone."

Montgomery left for the hospital. Det. Blaine arrived and the officers "surmised that the attacker had tried to break into the shed." He communicated this to Captain Murphy, who was at the hospital, and he asked Montgomery for consent to search the home and outbuildings. At the hospital, a nurse who cared for Montgomery noted in the record that he was not actively bleeding and that he was alert, oriented and answered questions appropriately. He complained of extreme pain and was given morphine. He responded "'That's fine' without question or hesitation." The officers did not obtain a written consent nor did they tell him he could refuse. Ewing also signed a consent form at the house. The officers discovered a marijuana growing operation.

"The officers had other reasons to search the area. They noticed marijuana paraphernalia in the kitchen, a humming noise coming from the shed, a pressurized garden hose leading into the shed and the smell of marijuana near the shed, leading them to think that the shed housed a marijuana-growing operation."

[98] U.S. v. McCauley, 548 F.3d 440 (6th Cir. 2008).
[99] Illinois v. Rodriguez, 497 U.S. 177 (1990).

Montgomery was indicted. He moved for suppression, which was denied. He then took a conditional guilty plea and appealed.

ISSUE: Does medication automatically negate a consent?

HOLDING: No

DISCUSSION: The Court agreed that "medication or intoxication may diminish the capacity to consent to the extent it undermines an individual's grasp on the reality of what he is doing." As such, "when officers seek and obtain consent from a medicated or intoxicated individual, as is sometimes appropriate, they can expect a dispute about the voluntariness of any consent given and what often comes with it: attendance and testimony at a suppression hearing."

Yet, the Court noted, "Montgomery apparently wants more. He wants what amounts to a per se rule that medication (or intoxication) necessarily defeats and individual's capacity to consent, given that the only cognizable evidence on which he relies relates to the morphine injection." The Court found that a "bridge too far," as "per se rules are anathema to the Fourth Amendment." Further, "drug-induced impairment, moreover, is a matter of degree, making it appropriate to gauge the impact of drugs on a case-by-case basis and in view of other circumstances at play."

The Court reviewed related case law with respect to Miranda waivers, noting that the "knowing and intelligent prong of the Miranda waiver inquiry is more protective of individual liberty than the consent-to-search doctrine." In Montgomery's case, the doctor noted that the doctor obviously believed that Montgomery was capable of making medical decisions. Everyone who observed him indicated he was alert and oriented.

The denial of the motion to suppress was affirmed.

U.S. v. Allen
619 F.3d 518 (6th Cir. 2010)

FACTS: On August 29, 2006, (Michigan) Officer Goodine attempted to stop a vehicle in which Allen was a passenger. That precipitated a high speed chase. When the vehicle was finally stopped, Allen and the driver got out. Allen did not comply with the officer's order and was tased. He fell to the ground and was handcuffed. Officer Goodine found a bag of crack cocaine and a weapon that he believed came from the passenger's side of the vehicle. Allen was indicted for trafficking and possession of the weapon. He initially took a plea but was allowed to retract that plea when "Officer Goodine was indicted on multiple charges relating to theft and official misconduct." Allen was convicted and appealed.

ISSUE: If a subject flees from an improper stop, is that a new and distinct crime?

HOLDING: Yes

DISCUSSION: Among other issues, Allen argued that the evidence seized should have been suppressed because the stop itself was improper. The Court however, noted that "[i]f a suspect's

response to an illegal stop 'is itself a new, distinct crime, then the police constitutionally may arrest the [suspect] for that crime.'"[100] In this case, the "act of fleeing from police officers constituted a new, distinct crime that rendered evidence subsequently seized admissible." Allen's conviction was affirmed.

U.S. v. Kimber
2010 WL 3521937 (6th Cir. 2010)

FACTS: On Nov. 11, 2006, just before midnight, six Cincinnati police officers "acting without a warrant, entered the Alms Hill Apartments." The building is a converted hotel. The officers were members of a "violent crime squad" but there was no indication of "any specific criminal activity" was occurring there, although it was a known "hot spot." "Rather on account of inclement weather, they had decided to visit the building in lieu of patrolling the city streets." Since they did not have a keycard, "they forced the door open." In the lobby, they encountered Kimber, who "appeared surprised and attempted to turn and walk away" when he spotted the officers. One of the officers spotted a handgun and he was frisked. The loaded gun was found and he was arrested for its possession, he later admitted that he was a convicted felon and also had drugs on his person. Kimber was not charged in federal court for the drugs.

Kimber was, however, indicted in federal court for the weapon offenses and moved for suppression. At a subsequent evidentiary hearing, one of the officers testified that the property owner had a "trespass letter" on file with the department, which authorized the police to enforce trespassing law on the property. The letter presented, however, dated two months after Kimber's address. The officer testified that a similar letter was on file at the time of the arrest. (At some point, an earlier letter from a prior property owner was entered into the record that was substantially similar.)

The same officer testified as to how they gained entry without a keycard, a method that had been shown to them by a resident. The hearing testimony indicated that it was supposed to be a secure door, but that "for some odd reason, you can yank the door (in a particular manner) and it will open."

Evidence also indicated that Kimber, in fact, lived at the address, but the officer testified that it "was determined" …that he did not actually live there. He was carrying an "Ohio non-driver identification card" that listed that address, however.

The District Court found that the entry was lawful and that the arrest was justified, under plain view. Kimber took a conditional guilty plea and appealed.

ISSUE: May a previous owner give consent to enforce a no trespassing statute?

HOLDING: No

[100] U.S. v. Castillo, 2000 WL 1800481 (6th Cir. 2000).

DISCUSSION: The Court began a "search pursuant to third-party consent will not violate the Fourth Amendment so long as the party granting consent had either actual authority or apparent authority to do so."[101]

Further:

> To possess actual authority, a third party must "possess[] common authority over or other sufficient relationship to the premises . . . sought to be inspected."[102])." Apparent authority exists if "the facts available to the officer[s] at the moment [would] warrant a man of reasonable caution in the belief that [there was] consent [from a] party [that] had authority over the premises . . . ."[103]

The Court elected to review the case under both actual and apparent authority. The Court noted that the "only party with actual authority to consent to the issue" was the current property owner. However, "it goes without saying that even a party with authority over the premises at the time of a search cannot grant consent retroactively."[104] The testifying officers were unclear as to whether consent had been obtained from the current property owner at the time the arrest was made. With respect to apparent authority, the Court noted that the "existence of a statement of consent from *someone* claiming authority is not always enough." The earlier letter from a previous property owner could not be relied upon by officers who knew that the property had changed hands multiple times, particularly when the officer knew there had been a problem in the past with outdated letters.

The Court "exhausted the possibility for affirmance under the Fourth Amendment's consent exception."

> The Court looked to Kimber's reasonable expectation of privacy in the lobby. In U.S. v. Carriger, the Court had held that "a tenant in [a locked] apartment building has a reasonable expectation of privacy in the common areas of the building not open to the general public."[105] The government argued that he had "no constitutionally protected expectation of privacy, because (1) he was not a tenant or resident of the Alms Hill Apartments, and (2) the building was not sufficiently secure to qualify as "locked." The Court looked to Minnesota v. Olson, which stated the overnight guests might also have some expectation of privacy in an area, as well.[106]
>
> As such, the Court noted that "the controlling inquiry is not whether Kimber was a tenant of the Alms Hill Apartments, as the government suggests, or even a resident – but rather, whether he was, at the very least, an overnight guest." Kimber argued the was a resident, and the evidence indicated that he was, at

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[101] U.S. v. Morgan, 435 F.3d 660 (6th Cir. 2006).
[102] U.S. v. Matlock, 415 U.S. 164 (1974).
[103] Illinois v. Rodriguez, 497 U.S. 177 (1990); see also Morgan, supra, ("Apparent authority is judged by an objective standard. . . . [It exists] if the officers reasonably could conclude from the facts available that the third party had [actual] authority to consent to the search." (quoting U.S. v. Hunyady, 409 F.3d 297 (6th Cir. 2005)).
[104] U.S. v. Lewis, 231 F.3d 238 (6th Cir. 2000).
[105] 541 F.2d 545 (6th Cir. 1976).
[106] 495 U.S. 91 (1990)

least, an occasional guest there. The issue of the building was not whether it "was *physically possible* for an officer to gain entry, but rather, whether the tenant would have expected him to do so and whether society would regard such expectation as reasonable." The Court found it was "subjectively unexpected and objectively unreasonable: for the officers "to circumvent a lock by forcing open the door in this case." "With regard to Kimber's subjective expectation of privacy, there is no evidence that Kimber knew or should have known that the lock could be circumvented in this manner."

Kimber's conditional guilty plea was vacated and the case remanded.

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. Guarjardo
2010 WL 3069605 (6th Cir. 2010)

FACTS: On August 29, 2007, Officer Hoppe (Tennessee Highway Patrol) was patrolling on I-75. He was in the median when he saw a vehicle travelling well below the speed limit and observed it cross the fog line. The vehicle slowed even more when the driver apparently noticed the marked car in the median. Officer Hoppe knew there was a nearby methadone clinic and that drivers were often impaired in the area. He estimated the vehicle was going about 48 mph initially, but it speeded up to 55. He made the stop at 8:32 a.m. The driver (Guarjardo) admitted he had no OL. He was brought out of the vehicle and denied being intoxicated - Hoppe was also "quickly satisfied" that he was not impaired.

Hoppe questioned the occupants' travel plans and intentions and Guardjardo become increasingly nervous - "swinging his arms, looking distressed, and having his voice crack." Due to traffic, Hoppe decided to get the vehicle off the expressway and while he followed the vehicle to the next exit, he was able to verify some information, but not enough to confirm the driver's name at that time. Eventually, at the second location, some 25 minutes later, Guarjardo gave consent to search. After a detailed search, Hoppe found suspicious containers of cat litter and ID hidden in the engine compartment. He found the litter bags suspicious in that the sealing strip of one appeared to have been tampered with and one was heavier than the other. He had the passenger (Lara) open the heavier bag and ultimately 10 kilos of cocaine and three of heroin were found in the bag.

Both men were charged and indicted for drug trafficking. Guarjardo moved for suppression and that was denied. He took a conditional guilty plea and appealed.

ISSUE: Is reasonable suspicion sufficient for an officer to investigate an ongoing traffic offense?

HOLDING: Yes

DISCUSSION: The Court began by noting that "[a]lthough 'virtually every other circuit court of appeals has held that reasonable suspicion suffices to justify an investigatory stop for a traffic

violation,' this circuit has required probable cause to justify an investigatory stop for *completed* misdemeanor traffic violations.[107]" This court has also held, however, that when the stop is for an *ongoing* violation—no matter how minor—reasonable suspicion will be sufficient to justify an investigatory stop."

Guarjardo argued that there was nothing posted as to a minimum speed limit and nothing on the record that he was somehow impeding traffic. He also noted that although he did not have his lights on, as required by Tennessee law when it was raining, the in-car video indicated that Hoppe's wipers were on, at best, only intermittently, apparently suggested that the rain was also intermittent. The government argued that Hoppe had probable cause, from his own observation, that Guarjardo had failed to stay in his lane of travel. The trial court had justified the stop on Hoppe's reasonable suspicion that Guarjardo was "engaged in the ongoing offense of driving while intoxicated." The Court agreed that "[b]ecause Hoppe had reasonable suspicion to believe that the defendant was driving while impaired, the initial investigatory stop was proper under the Fourth Amendment." Further, the court found that Hoppe did not impermissibly extend the duration of the stop and that it was perfectly appropriate for Hoppe to consider the matter still unresolved. As such, the duration of the stop was appropriate. With respect to the scope, the court agreed that Hoppe's request and the consent that did not expressly limit the scope was proper and did extend to the closed containers of cat litter. The court agreed that "although one may delimit the scope of a search to which he consents, no explicit authorization is required to search a particular container "if his consent would reasonably be understood to extend to a particular container." The Court also agreed that "at the time the first cat litter container was opened, Hoppe had probable cause to believe that contraband would be found inside."[108]

Guarjardo's plea was upheld.

U.S. v. Street
614 F.3d 228 (6th Cir. 2010)

FACTS: On January 23, 2008, Washington County (TN) officers got a very specific tip about a methamphetamine sale that would take places later that day. Sgt. Gregg spotted the tipped vehicle and noticed that neither occupant was wearing a seat belt.

Lt. Remine learned about the traffic violation and stopped the vehicle. He had the driver, Sam Street, get out. As Street walked toward the back of the car, he was observed putting his hand in his pocket and grabbing something. "Concerned that Street was reaching for a weapon, one of the officers grabbed his armed and asked if he had something in his pocket. Street admitted to have a pistol - the officer "removed Street's hand from his pocket, reached in and retrieved" the pistol. Street did not have a permit to carry it.

The passenger, Randall Street, was asked to get out and was frisked, on the reasoning that, if the driver was armed, the passenger might also be. He was frisked and three bulges were found - Randall admitted they were drugs. They turned out to be three balloons of crystal methamphetamine. Scales were later found on his person at the jail.

[107] U.S. v. Simpson, 520 F.3d 531 (6th Cir. 2008); see also U.S. v. Sanford, 476 F.3d 391 (6th Cir. 2007).
[108] California v. Acevedo, 500 U.S. 565 (1991).

Both men were indicted. Randall moved for suppression, but the trial court found the search appropriate. Randall was convicted and appealed.

ISSUE: Must an officer take the least intrusive measures possible during a traffic stop?

HOLDING: No

DISCUSSION: The Court found that "the police had a legitimate basis for their actions at each stage of the encounter." The initial stop was appropriate, even if pretextual.[109] Both men were legitimately asked to get out of the car.[110] It was further appropriate to grab Street's arm as it was only a "minor infringement on his physical liberty, one proportionate to the risk created by a suspect's reaching into his pockets during a traffic stop and commensurate to other common (and commonly accepted) exercises of physical control during a stop prompted by probable cause to suspect a violation of law, including: removing a driver or passenger from a car; directing the suspects where to stand; directing them where to place their arms during the encounter; and for that matter holding their arms as officers escort them to a specific location."

Street argued that the "officer could have done less" and offered alternatives. "But the Fourth Amendment demands reasonableness, not unforgiving scrutiny; it demands that the officer take sensible steps given the circumstances of the encounter, not that he take the least intrusive steps imaginable." The Court agreed that retrieving the gun was proper as well.

Street's conviction was affirmed.

SEARCH & SEIZURE – TERRY

U.S. v. McKnight
2010 WL 2836319 9 (6th Cir. 2010)

FACTS: On December 31, 2006, Sgt. Towers (Nashville PD) received a call of a "man with a gun at 151 University Court." He was not surprised, as the area, a public housing complex, was "regularly plagued" with violent crime. And of course, since it was New Year's Eve, he expected to hear and report to sounds of gunfire throughout the night.

He arrived about midnight at the address and received more information. "The initial call arose from a domestic dispute, during which a man with a shotgun threatened the caller." The caller identified herself as the suspect's girlfriend, although it was unclear if she provided her name. She did identify the shooter as McKnight and explained she's fled to a nearby residence, from where she made the call. She also gave a physical description of McKnight.

Towers was waiting for backup when he spotted a man fitting the description, and he called out, "Barry." The man walked to him and agreed he was Barry McKnight. Towers arrested McKnight

[109] Whren v. U.S., 517 U.S. 896 (1996).
[110] Pennsylvania v. Mimms, 434 U.S. 106 (1977); Maryland v. Wilson, 519 U.S. 408 (1997).

and provided Miranda warnings. McKnight agreed he owned a shotgun and took them to the apartment to show it to them.

McKnight was eventually indicted for being a felon in possession. He requested suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a crime victim's statement sufficient support an investigatory stop, even if the victim is not known at the time?

HOLDING: Yes

DISCUSSION: The Court noted that Sgt. Towers' recitation of the facts of the events were credible and found no reason to disturb that finding. It noted that a "crime victim's statement generally will suffice to establish probable cause, to say nothing of proof beyond a reasonable doubt in some settings."[111] All of the circumstances, including Towers' own observations, "amounted to reasonable reliable information that McKnight had committed a crime." McKnight equated the information to that in Florida v. J.L., an uncorroborated tip of a crime.[112] The "risk presented by an anonymous tip is that the police have no recourse when the tip is false and few grounds for verifying it." But "these cautionary considerations are just that: considerations. They do not establish an unbending requirement that the police may never rely on anonymous phone calls."[113] The Court noted that the tip in this case "concerned a report of criminal activity against *her*" – the caller. She gave her location. "Nothing in the record, moreover, suggests that Smith refused to give her name, only that at most an administrative error occurred because no one asked for her name and she never volunteered it."

McKnight also challenged the report because "it arose from a domestic dispute." The Court agreed that "officers are under no obligation to take a victim's statesment's *less* seriously when the victim knows her assailant."[114] The information arose "credibly from (and in the midst of) an alleged physical confrontation, as opposed to (less credibly) an out-of-the-blue report invoking an estranged partner's past wrongs."

McKnight also argued that his cooperative attitude diminished the probable cause that he had committed an offense, but the Court found that "cooperating with an officer does not necessarily diminish other evidence of wrongdoing."

The Court upheld the denial of the motion to suppress and affirmed McKnight's conviction.

U.S. v. LaBelle
2010 WL 3157144 (6th Cir. 2010)

FACTS: At about 2 a.m., on May 1, 2007, Officer Raskin (Auburn Hills, MI) was patrolling an industrial area on the side of I-75. He spotted LaBelle, on foot, wearing no raingear (it was

[111] U.S. v. Shaw, 464 F.3d 615 (6th Cir. 2006); U.S. v. Arnold, 486 F.3d 177 (6th Cir. 2007).
[112] 529 U.S. 266 (2000); See also U.S. v. May, 399 F.3d 817 (6th Cir. 2005).
[113] Illinois v. Gates, 462 U.S. 213 (1983).
[114] U.S. v. Harness, 453 F.3d 752 (6th Cir. 2006); Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

raining) and carrying a duffel bag. The officer found that activity suspicious because the area was usually devoid of pedestrian traffic and was also prone to criminal activity. He got out and approached LaBelle. LaBelle claimed he was on his way to his home in Pontiac. He said the bag contained clothing but would not permit a search. He walked away and Raskin went back to check on the information he'd been given as to the subject's identity. When he could get no responses on it, he concluded the information was false. He enlisted Sgt. Gagnon's help to find the subject; LaBelle was located on the other side of I-75, "scurrying on his hands and knees in waist-high vegetation up an embankment." He ignored calls to stop but Sgt. Gagnon was able to seize him. LaBelle no longer had the bag - it was located on the other embankment of the highway.

Officer Raskin searched the bag and found what he believed to be child pornography. Det. Tuski picked up the case and searched the bag in more detail, finding what appeared to be child pornography as well, as well as photos modified to add adult genitalia to benign advertising photos of children. It also contained clipped articles on child abductions, contact information for children and information on how to create DVDs.

Det. Tuski got a search warrant for LaBelle's home and more evidence was seized there relating to child pornography. LaBelle was indicted and moved for suppression. When that was denied, LaBelle took a conditional guilty plea and appealed.

ISSUE: Must an officer discontinue an investigation simply because the subject provides an identification?

HOLDING: No

DISCUSSION: The Court agreed with the trial court that the initial encounter "passed constitutional muster." LaBelle argued that Raskin had no right to continue the investigation once he identified himself. The Court however, noted that "stated differently, [LaBelle's] position is that Officer Raskin was required to accept, without question," LaBelle's responses." The Court agreed his refusal to consent was permitted, but that "Officer Raskin was not precluded from conducting follow-up investigation of the name … provided, nor was he required to cease surveillance of [LaBelle's] activities."

Further, the Court found that Tuski's affidavits "provides an extensive array of particularized facts, meeting the dictates of McPhearson."[115] It outlined LaBelle's related criminal activities in the area of child pornography, "some of which circumstances bear striking similar to this action." The Court agreed the evidence suggested more material might be found on a computer, and since a computer has a "fixed base," it was reasonable to conclude he had more material at his home.

The denial to suppress was affirmed.

[115] U.S. v. McPhearson, 469 F.3d 518 (6th Cir. 2006) (quoting U.S. v, Frazier, 423 F.3d 526 (6th Cir. 2005)).

U.S. v. Sutton
2010 WL 3119532 (6th Cir. 2010)

FACTS: On February 8, 2006, Deputy Miller (Lincoln County TN SO/17th Judicial Drug Task Force) received a call from Det. Crews (Shelbyville TN PD) that a man named Rashad was selling crack from a specific location. He was driving a gold Mitsubishi. Det. Crews drove by and found the vehicle, and followed it near the location specified. It left a few minutes later and Miller followed. As it left the park, the driver of the Mitsubishi "drove through a stop sign without stopping." It did stop at the next intersection. Crews checked the plate during this time. The vehicle then sped off at double the speed limit, again running through traffic control devices. Miller activated his emergency equipment. The vehicle stopped at a residence and the driver got out, walking through the car. Miller ordered him back to the car, but the driver responded that his ID was in the house. It took several more orders before the driver complied and returned to the car.

The driver "appeared very nervous" and identified himself as Sutton, but Miller quickly realized that Sutton was Rashad. Another officer arrived as backup. Miller asked Sutton if he was on probation or parole, he agreed he was on parole. He did not respond to a question about weapons. Miller frisked Sutton and "heard and felt a crunch of a cellophane wrapper" at his ankle. He pulled up the pant leg and found the wrapper sticking out of the sock, and found it to be crack cocaine. Sutton was arrested.

Miller ask the passenger, Bowman, who was also the registered owner of the car, "whether the officers could search the vehicle for hidden contraband." Bowman consented. The officers found powder and crack cocaine under the seat. Bowman also owned the trailer in question, identified in the original tip, and again, she gave consent. The officers searched, finding scales and marijuana. Sutton also had about $1,300 in his possession. Sutton was given Miranda, waived his rights and admitted the cocaine was his.

Sutton requested suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is it reasonable to believe a suspected drug dealer is armed?

HOLDING: Yes

DISCUSSION: The Court began, identifying the "crux of Sutton's argument is that Miller fabricated the traffic violations in order to stop Sutton in the hopes of finding contraband" – especially since Sutton did not charge Miller with any traffic offenses. The Court noted that a "credibility determination" made by the trial court, "will only be set aside if it is clearly erroneous." In this case, the Court agreed Miller's recitation of the facts was credible.

Sutton also argued that the frisk was improper because "Miller did not have reasonable suspicion to believe that Sutton was dangerous." Although he did not raise the issue in a timely manner, and thus the Court was not required to consider it, it chose to do so. The court found that it was reasonable for Miller to believe Sutton might be armed, but the Court had held previously "that officers who stop a person reasonably suspected of carrying drugs 'are entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions' and to

take reasonable measures to protect themselves."[116] The additional circumstances, including Sutton's behavior when stopped, made it doubly reasonably that he may be armed.

The Court upheld the denial of the suppression motion.

U.S. v. Walker
615 F.3d 728 (6th Cir. 2010)

FACTS: On December 5, 2005, Agent Kelly (FBI) responded to a bank robbery call in Sciotoville, Ohio. He was given a description of the perpetrator and a vehicle description with license plate. Local authorities issued a BOLO. Officer Bower (Portsmouth PD) located a vehicle matching the description some 27 minutes after the robbery, in a parking lot. He observed as Burke walked towards the car. As Officer Bower approached Burke and the car, he saw Walker, who owned the business, approach with a black duffel bag. Officer Bower asked Walker "whether he was the one driving the van" and he agreed he was. When the officer asked him for ID Walker walked to the other side of the vehicle. When the officer told him to stop, he partially unzipped the bag. "Officer Bower grabbed the bag, placed it on the ground and escorted Walker about eight feet away to the front of the police cruiser," away from Burke, where he was frisked.

Officer Timberlake arrived and was directed to frisk Burke, who was still standing near the car. Burke provided ID, but Walker insisted that his ID was in his wallet, in the bag which had been left near the car. The officers offered to get the wallet, but Walker responded "I'd rather not let you get in the bag" and "I have some personal things in there." Officer Timberlake, however, unzipped the bag further and spotted a "skeleton mask" that matched the description of one used in the robbery. Both men were handcuffed and given Miranda. Officer Bower asked about the gun and money, Walker told him the gun was in the bag but did not respond about the money. The officers obtained a warrant and searched the bag, finding the money and a firearm.

Walker was indicted for the robbery (and others) and sought suppression. The trial court denied the suppression. Eventually Walker took a conditional plea relating to robberies in Ohio and Kentucky. He then appealed.

ISSUE: Is it reasonable to further open a partially opened duffel bag to determine if a weapon is accessible?

HOLDING: Yes

DISCUSSION: The parties agreed that the officers believed they were dealing with an "armed and dangerous individual," based on a BOLO and Walker's statements. The parties agreed the officers could do a limited search of the bag. Walker, however, argued that at most, the officers should have done a frisk of the bag, rather than unzipping it further. The Court, however, agreed that "[u]nzipping the bag more than it was already unzipped was 'an efficient and expedient way' to determine whether a gun lay on the top of the bag, ready for use." The Court noted that the officers were not obligated to use the least intrusive ways to achieve their objective, only a reasonable method. The Court found it "fair to say that the search was reasonably designed to

[116] U.S. v. Jacob, 377 F.3d 573 (6th Cir. 2004); U.S. v. Heath, 259 F.3d 522 (6th Cir. 2001).

discover weapons that might pose a threat to the officers' safety, namely weapons lying on the top of the already partially unzipped duffel bag." The court found the "modest search" to be quite reasonable.[117]

Further, the Court noted that its "job is to ask what was reasonable under the circumstances, not to poke and prod for lesser-included options that might not occur to even the most reasonable and seasoned officer in the immediacy of a dangerous encounter." The Court also agreed that although Walker was located some eight feet from the bag, Burke was only three feet from it, and both men were as yet unrestrained.

The Court continued:

> … according to Walker's own telling, the officers did not have probable cause to arrest either suspect when the search was made. If true, that left the officers with a difficult set of options. They could make a limited search of the bag to ensure their own safety. Or they could arrest the suspects and take them into custody, even though it might not yet have been clear that probable cause existed that they had robbed the bank. Or they could let the men go and return the un-searched bag to Walker. Faced with these kinds of split-second judgments, police officers, it is clear, have a much more difficult job than we judges, who may take several weeks (if not months) to resolve these kinds of issues. That is why we do not "require that police officers take unnecessary risks in the performance of their duties."[118] Where, as here, the only alternative is to give a suspect access to a potential weapon (in an un-searched bag), a Terry search for weapons is justified—and reasonable.

Walker's conviction was affirmed.

U.S. v. Johnson
620 F.3d 685 (6th Cir. 2010)

FACTS: On April 14, 2007, at about 4 a.m., a resident of a housing authority apartment called 911. The conversation was as follows:

> OPERATOR: 911 Where is your emergency?
> CALLER: [XYZ] Whitson Drive.
> OPERATOR: What's the problem there?
> CALLER: Um. They've finally had to come over here a couple of times before because I had some people coming by my house and they're back.
> OPERATOR: What kind of vehicle are they in?
> CALLER: They've got it parked now. They're outside their vehicle walking around my house.
> OPERATOR: And what kind of vehicle is it?
> CALLER: A Cadillac. Uh a blue Cadillac.

[117] U.S. v. Williams, 962 F.2d 1218 (6th Cir. 1992).
[118] Terry v. Ohio, 392 U.S. 1 (1969); Michigan v. Long, 463 U.S.1032 (1983).

Sgt. Lamb and Officer Parton (Newport PD) responded. They did not hear the call, of course, but "were told by the dispatcher that the caller reported suspicious activity around a blue Cadillac." The officers later testified that they'd responded to calls from the same caller earlier that same day and on the previous day.

> Although Lamb stated that the earlier calls involved "some subjects that had been coming to her residence bothering her," and agreed with defense counsel that the caller stated "that those people had been there looking for somebody, At some point, the basis for these characterizations was never brought out, and the district court found that "the nature of the prior complaints is not known"[119] .

The officers arrived in minutes at the duplex. They were aware it was a high drug trafficking area. They saw a blue Cadillac with a shredded, flat tire. The two officers parked behind the vehicle. They got out, looking around, and saw Johnson "walking from a grassy area to the side of the duplex toward Buda Road, where a white car with a female driver was waiting." He was not close to the Cadillac. They saw no one else in the immediate area. Johnson was carrying a "bag" - which Sgt. Lamb found suspicious. They called to Johnson to stop and identified themselves as police, but he continued to walk toward the other car. He eventually opened the passenger-side door and tossed the bag inside. The officers ordered him to put up his hands - Johnson did not do so. Only after demands at gunpoint were made did he finally do so.

> On the officers' orders, Johnson then stepped out from the side of the vehicle, whereupon Lamb noticed a sagging bulge in the hand-warmer of the hooded sweatshirt that Johnson was wearing. Around this time, Lamb observed Johnson "sort of bending over . . . , he bent over and actually put his hands towards his middle region of his, of his body, and was sorta slumped over and bending." Lamb approached Johnson, patted him down, and discovered a loaded gun inside a sock in the hand warmer. The officers handcuffed Johnson and recovered from his person 3.8 grams of cocaine base, assorted pills, and a glass pipe. A third officer arrived during the arrest to back up Lamb and Parton.

Johnson was charged for drug trafficking and having a firearm while involved in drug trafficking. He requested suppression and was denied - the trial court concluding that "although the 911 call "lacked even moderate indicia of reliability," the officers' initial attempt to speak to Johnson was permissible and Johnson's "actions after this initial request, when viewed in the totality of the circumstances, . . . provide[d] the officers with a particularized and objective basis for stopping the defendant."

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[119] Lamb ran the license plate for the blue Cadillac and discovered that it was registered to Johnson. The record does not specify whether he learned this information before the encounter with Johnson or after arresting Johnson. Lamb also testified that he had pulled over Johnson for running a stop sign in a blue Cadillac a month before the incident at Whitson Drive. However, Lamb did not indicate when he realized that he had previously encountered Johnson or when he remembered that Johnson had been driving a blue Cadillac. Lamb gave no indication that he recognized Johnson or associated him with the Cadillac at any point during the sequence of events on April 14, 2007.

Johnson took a conditional guilty plea and appealed.

ISSUE: Is a subject seized when they stop in response to an officer's demand that they do so?

HOLDING: Yes

DISCUSSION: Johnson argued that the "officers lacked a constitutional basis to detain him" initially. As such, the dispositive issue in this case is whether Sergeant Lamb and Officer Parton had reasonable suspicion that Johnson had committed, was committing, or was about to commit a crime when they stopped him."

The Court agreed that "[a] reasonable person in Johnson's position would not have felt free to leave when the officers ordered him to stop. There were two officers, they had arrived in marked police cars, they announced themselves as police several times, and they yelled at Johnson to "'stop' and 'stay right there where he was' as they advanced toward him in the dead of night." When he reached the car and stood waiting, he yielded to the officers' demands that he stop. The Court continued:

> It would be an unnatural reading of the case law to hold that a defendant who is ordered to stop is not seized until he stops *and* complies with a subsequent order to raise his hands. If a subject is seized only if (1) "a reasonable person would have believed that he was not free to leave,"[120] and (2) the subject actually "yield[s]" to the message that he is not free to leave, then for a person who is moving, to "yield" most sensibly means to stop. To "yield" cannot mean to comply with each subsequent order made by an officer after the subject's initial compliance. Indeed, if a person stopped and raised his hands at an officer's command but failed to obey a further command to spread his legs or to lie on the ground, we would not say that he had not been seized initially. It is enough to submit to an officer's initial command to stop and to remain stopped.
>
> It might be argued that Johnson had not truly yielded when he stood at the passenger-side door because he *looked* like he might flee. Such an argument would be unconvincing. First, Johnson had in fact stopped. There is no dispute that he stood still at the passenger door. Second, the government cites no case suggesting that a person who has actually stopped in response to officers' commands but who looks like he *might* run has not submitted to an order to stop. Third, even if some such case exists, Sergeant Lamb offered precious little objective basis for his belief that Johnson "was either thinking I'm going to jump in the car or I'm going to run, one [or] the other." The only testimony that Lamb provided in support of this belief is that Johnson "was sort of bracing himself in the door frame and on the top of the door." But bracing much more strongly suggests holding one's position than preparing to flee.

[120] California v. Hodari D., 499 U.S. 621 (1991).

> Moreover, both of Johnson's hands were on the car, apparently within Lamb's view, and it is unclear whether the car's engine was even running. Without something more—perhaps moving into the car or signaling to the driver—there are inadequate grounds to conclude that Johnson considered fleeing.

The Court concluded that once he stopped and stood by the car, he was, in fact, seized. The Court detailed the information available to the officers at that moment.

> (1) Johnson was in a high drug-trafficking area; (2) it was 4:00 a.m.; (3) the officers were responding to a 911 call; (4) two or three minutes after the 911 call, the officers observed Johnson twenty to thirty yards from the blue Cadillac referenced in the call and near the residence from which the call was made; (5) the officers did not notice anyone else in the area, besides the driver of the white car to which Johnson was headed; (6) Johnson did not stop when called to by the officers and instead continued walking toward the white car; and (7) he was carrying a bag, which he threw into the white car.

The Court looked at each factor, finding the first two should not be given undue weight. The next three turn "on the content and reliability of the call." The Court agreed that the "the 911 call 'was too vague and 'provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility,' and it lacked even 'moderate indicia of reliability.'" The caller did not identify the suspects beyond calling them "some people," and thus the police had no descriptive information or anticipated behavior by which to identify a particular suspect on the scene. Moreover, the 911 caller provided insufficient reason to believe that Johnson, even if he was one of the "people" she had called about, had committed, was committing, or was about to commit a crime. The caller stated only that "some people" who had been near her home earlier were "back" and were "outside their vehicle walking around my house." The caller did not specify "any incriminating behavior or indicate that she suspected them of any criminal conduct in particular."

The Court then addressed "the facts that might cast suspicion on Johnson in particular, as opposed to anyone who happened to be in the area—the sixth and seventh facts." The Court found it "undisputed that the officers lacked reasonable suspicion to seize Johnson when they called for him to stop and that Johnson was entitled to keep walking." Despite the governments argue that "ignoring an unconstitutional order contributes to reasonable suspicion." The Court doubted "the wisdom of labeling reasonably suspicious the proper exercise of one's constitutional rights."

The Court concluded that despite ongoing debate, "*this case* … does not present even a close question." Johnson did not "change course or otherwise react suspiciously to the police" - in fact, he did not react at all but simply continued about his business.

Because the Court found the officers lacked reasonable suspicion for the initial seizure, the Court held everything found after the stop to be subject to exclusion. The denial of his motion to suppress was reversed.

INTERROGATION - MIRANDA

U.S. v. Ivy
2010 WL 3398905 (6th Cir. 2010)

FACTS: On January 11, 2007, Memphis (TN) officers went to a residence investigating "internet child pornography." They had Ivy's name but did not know if he lived there. They were met at the door by Ivy, who invited them in and told them he lived there with Blalock. He was told what they were investigating and he "told them there were no children in the house, and that he had never touched a child." But he refused to talk about internet pornography without an attorney. They left the house after given him contact information. He was not given Miranda at that time as "nothing even remotely resembling a custodial investigation occurred at this first meeting."

Later that day, Blalock executed a consent to search on the address, but in an abundance of caution, the officers also obtained a search warrant. When they arrived the next day, however, no one was home. They contact Blalock who had Ivy go to the house. Before he did so, however, he "asked if he was going to be arrested." They assured him he would not be, but that "they did need a key to make a non-forceful entry into the house."

Ivy provided the key and "volunteered that he was going to cooperate with the officers." Because he had indicated he wanted an attorney before, the agent "contacted an AUSA[121] who told him it was permissible to proceed." Ivy gave a signed statement. Although not in custody, he was given his Miranda warnings and signed a waiver.

"At this point [Ivy] told the officers he had destroyed the hard drive on his computer, which was the principal item the officers had sought to secure with the search warrant." He took the officers to where he had disposed of it, "but the hard drive was too damaged to have any evidentiary value." Back at the house, Blalock had arrived and showed officers "some secret hiding places." They found a marijuana growing operation but no federal charges were placed. Ivy agreed to come to the station and drove himself there.

There, Ivy "admitted to growing the marijuana and made a number of incriminating statements relative to his internet pornography activities." It was reduced to writing and he signed a statement. He was then allowed to leave.

A month later, on February 8, he returned "unescorted and in his own automobile." He was again giving Miranda warnings and signed a waiver. He gave the agents "some of his internet contacts." He was there "less than an hour, was not arrested, and again left on his own." He was indicted in August and requested suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is the scene of the execution of a search warrant custody for Miranda purposes?

HOLDING: No

[121] Assistant United States Attorney.

DISCUSSION: Ivy argued that he was in custody during the execution of the search warrant, and that he should have received Miranda at the time. He argued that his later Mirandized statements were the fruit of the poisonous tree from that unwarned interaction. He stated he was told that "he was best served by not having an attorney and that he would be better off cooperating." He also "indicated that he felt intimidated by the agents in reaching some of his decisions."

The court, however, found that Ivy was "not in custody when he made the challenged statements" and affirmed his plea.

Fields v. Howes
617 F.3d 813 (6th Cir. 2010)

FACTS: Fields was incarcerated at the Lenawee County Sheriff's Dept on December 23, 2001, for disorderly conduct. He was taken from his cell to a locked conference room, but was not told where he was being taken or for what purpose. He was not handcuffed but was in a jail jumpsuit. There he was questioned about his relationship with Bice, a minor, by Deputy Sheriffs Batterson and Sharp. The questioning started between 7 and 9 p.m. and lasted for about 7 hours. Fields was not given his Miranda warnings but was told if he did not want to cooperate he was free to leave, but that it would have taken about 20 minutes to actually leave as a corrections officer would be needed to return him to jail. At one point Fields became angry, and he was told if he "continued to yell the interview would be terminated."

He did not ask for an attorney or to go back to his cell, but did say more than once that he "did not want to speak to them anymore." During the interview he finally admitted to sexual contact with Bice. These statements were introduced against him at trial. He was convicted and appealed. The Michigan state courts upheld the conviction and Fields filed for a habeas petition. The District Court permitted the petition, finding that the "state court unreasonably applied Mathis v. U.S."[122]

ISSUE: Is a subject in custody for unrelated purposes in custody for Miranda purposes?

HOLDING: Yes

DISCUSSION: The Court noted that Miranda "only applies if the suspect was (1) interrogated while (2) in custody."[123] The Government agreed that Fields had been subjected to an interrogation, the only question which remained was whether he was in Miranda custody. "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'"[124] Further, "although the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving of Miranda protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[125] In Mathis, the Court had held that "nothing in the Miranda opinion ... calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody." That court also "found

[122] 391 U.S. 1 (1963).
[123] Rhode Island v. Innis, 446 U.S. 291 (1980).
[124] Oregon v. Mathiason, 429 U.S. 492 (1977).
[125] California v. Beheler, 463 U.S. 1121 (1983).

that requiring Miranda warnings only where questioning occurs in connection with the case for which a suspect is being held in custody 'goes against the whole purpose of the Miranda decision which was designed to give meaningful protection to Fifth Amendment rights.'" Finally, the "central holding of Mathis is that a Miranda warning is required whenever an incarcerated individual is isolated from the general prison population and interrogated, i.e. questioned in a manner likely to lead to self-incrimination, about conduct occurring outside of the prison."

The Court looked to the recently decided case of Maryland v. Shatzer[126], which held that "an incarcerated prisoner subjected to questioning on an unrelated crime to be in custody for Miranda purposes."

The Court affirmed the writ of habeas corpus.

Hoffner v. Bradshaw (Warden)
622 F.3d 487 (6th Cir. 2010)

FACTS: On September 22, 1993, Hoffner and Dixon kidnapped and robbed Hammer, who was then buried alive and left to die. Hoffner became a suspect and was questioned, he denied involvement but made statements incriminating Dixon. He agreed to go downtown and on the way, volunteered that Dixon had told him where the body was buried. He led police to the gravesite. At the station, he was given Miranda. He waived rights and gave a statement implicating Dixon. After the body was found, Dixon confessed and implicated Hoffner. Hoffner was given his rights, again, waived them, and confessed.

Ultimately Hoffner was convicted. He appealed.

ISSUE: Does a coercive atmosphere (a police station) automatically make a location custody for Miranda purposes?

HOLDING: No

DISCUSSION: Addressing Hoffner's claim, the Ohio Supreme Court began by explaining that:

> "Miranda warnings are not required simply because the questioning takes place in a coercive atmosphere."[127] Rather, the court undertook analysis under Thompson v. Keohane[128] and California v. Beheler[129] to determine whether Hoffner would have felt that he was not at liberty to terminate the interview and leave. The court found that the police's initial questioning regarding Hammer's whereabouts consisted of "[g]eneral on-the-scene questioning" not subject to the Miranda warning requirement. Further the court found "no evidence that police officers coerced Hoffner into making any statements"; rather, Hoffner "voluntarily offered information that Dixon had killed Hammer." The court held that the police's initial

[126] 130 S.Ct. 1213 (2010).
[127] Oregon v. Mathiason, 429 U.S. 492 (1977).
[128] 516 U.S. 99 (1995).
[129] 463 U.S. 1121 (1983),

> instructions to Hoffner to stay in a specific location were reasonably necessary to secure the scene and did not place Hoffner in custody. The court also found that events after Hoffner left the Wilkerson house in the police vehicle did not constitute custodial interrogation. According to the Ohio Supreme Court, "Hoffner voluntarily agreed to go to police headquarters to give a taped statement. On the way to the station, Hoffner offered to direct police to the location of Hammer's body." The court reasoned that "[b]ecause Hoffner was not under arrest or in custody . . . , police were not required to issue Miranda warnings." As to the interrogations at the police station occurring both before and after his arrest, the court found that, in both instances, Hoffner voluntarily waived his Miranda rights in writing. Therefore, the court concluded that "[a]ll of Hoffner's statements regarding Hammer's disappearance and murder were voluntarily made and properly admitted at trial." The district court found that "the Ohio Supreme Court correctly identified and reasonably applied federal precedent to this case's facts" and therefore denied *habeas* relief on this claim. Hoffner argues that this was an unreasonable application of Supreme Court precedent. He claims that the initial questioning at the Wilkerson house was custodial because he was not free to leave after ten officers entered Wilkerson's house, and at least one officer pointed a gun at him and ordered him to stay in one place. He maintains that the questions he was asked at that point regarding Hammer's disappearance constituted interrogation. Hoffner argues that, because he gave incriminating statements to the police shortly thereafter and because his custody with the police was continuous until the time he gave his first statement, he could not have reasonably perceived the later questioning to be "new and distinct," which would have dissolved the taint of the earlier Miranda violation. Finally, he claims that the officers failed to ensure that, at the time he gave his confession, his earlier pre-Miranda statements could not be used against him, thus violating United States v. Pacheco-Lopez.[130]
>
> The procedural safeguards outlined in Miranda apply only to suspects subject to "custodial interrogation." This term was defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." "[T]he only relevant inquiry" for determining whether an individual is in custody "is how a reasonable man in the suspect's position would have understood his situation."[131]

The Court continued:

> This requires that resolve two questions: "[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by [Miranda]."

[130] 531 F.3d 420 (6th Cir. 2008).
[131] Berkermer v. McCarty, 468 U.S. 420 (1984).

> The Court agreed that "circumstances surrounding the beginning of Hoffner's interaction with the police do not reflect any form of coercion or custody." The "police did not need to give Hoffner Miranda warnings upon entering the house in order to ask basic investigatory questions." His responses were made voluntarily and were not in response to questioning.

The Court upheld Hoffner's conviction.

U.S. v. Williams
615 F.3d 657 (6th Cir. 2010)

FACTS: On October 12, 2004, Officers Vass and Pappas (Columbus, OH, PD) pulled up to a group of subjects "standing outside an affordable-housing complex." They recognized one individual, Williams, and told him that he was trespassing. Williams acknowledged that there might be a warrant for him and that he was armed. He was arrested. He moved for suppression of the evidence (a gun was found on him) and his statements. The trial court suppressed and the government appealed.

ISSUE: May a person feel seized when questioned by officers at the scene of a crime?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court agreed that:

> Williams was seized: a reasonable person would not have felt free to leave upon being approached by two uniformed officers in a marked car, singled out of a group, and immediately accused of a crime. The seizure was unlawful: Williams was not trespassing or committing any other crime when the officers approached, and the fact that others in his group were drinking publicly and *might* have been trespassing did not constitute reasonable suspicion that Williams himself had recently committed a crime or was about to commit one." His statement about the warrant was not the product of "free will"[132] The Court focused on the fact that "Vass immediately accused Williams of a crime" and his approach was not nonthreatening.[133]

The Court noted that although Williams was not trespassing, others in his group were. (Apparently he may have been on a sidewalk.) Some of the group were drinking, but not Williams. In the previous situation where he was accused of trespassing, he was not cited or written up. Loitering was not actually a crime in Ohio. The Court agreed the seizure was unreasonable.

> The government argued that the taint was attenuated[134] because of the warrant. "The test for attenuation is whether the evidence sought to be introduced—here,

[132] Brown v. Illinois, 422 U.S. 590 (1975).
[133] The Court does not elaborate on this, but apparently focused on the context of the approach and the fact that two uniformed officers were involved.
[134] Weakened

> the gun, the ammunition, and Williams's inculpatory statements—"has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." The Supreme Court has set forth three factors to guide this inquiry: "[t]he temporal proximity of the [unlawful detention] and the [emergence of the incriminating evidence at issue], the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." The Court rejected the argument, holding that although other circuits had" treated the discovery of a warrant as an intervening circumstance sufficient to render incriminating evidence admissible, we have never adopted its approach as the law of this circuit."[135] Moreover, allowing information obtained from a suspect about an outstanding warrant to purge the taint of an unconstitutional search or seizure would have deleterious effects. It would encourage officers to seize individuals without reasonable suspicion—not merely engage them in consensual encounters—and ask them about outstanding warrants.

The Court noted that the "purpose of stopping Williams was to seek evidence against him, and toward that end Vass immediately asked several questions related to criminal activity other than trespassing."

Finding that this case called for a "straightforward application of the exclusionary rule and the related fruit-of-the-poisonous-tree doctrine," the Court found the evidence had been correctly suppressed.

Treesh v. Bagley
612 F.3d 424 (6th Cir. 2010)

FACTS: On August 28, 1994, Officer Janusczak (Cleveland PD) arrested Treesh. He recited Miranda and asked if Treesh understood them. He didn't initially respond but finally said "yeah, yeah, I know." He was transferred to the custody of another PD, and then another, and finally was taken into booking. Lt. Doyle gave the following version of Miranda at that point.

> You understand you're under arrest? You've been arrested before. Do you understand your Miranda rights? I'm going to ask you some questions over the next hour or so, two hours or three hours. You have a right to answer the questions that I ask, or you can stop me at any time. If you can't afford an attorney, one will be appointed. Do you understand me? Okay.

Treesh agreed to talk and was interrogated for about an hour and forty five minutes. At some point, Doyle reminded Treesh of his rights again. He was jailed, but brought back a few hours later and again interrogated, after another reminder about rights. Less than an hour later, and FBI agent gave him the warnings again and Treesh signed a waiver form. He did so again a few hours later.

At about 2 p.m., during yet another interrogation, he invoked his right to counsel. He was ultimately found guilty in the Ohio courts and appealed. The Ohio Court found that "Doyle's

[135] U.S. v. Hudson, 405 F.3d 425 (6th Cir. 2005).

incomplete warning were sufficient" to apprise him of his rights. Treesh filed for habeas relief and was denied, but allowed the appeal that denial.

ISSUE: Must a subject be readvised of their Miranda rights if the situation has not changed?

HOLDING: No

DISCUSSION: The Court noted that, under Wyrick v. Fields, a suspect need not be readvised unless the situation has changed by the passage of time or other circumstances.[136] Although the first recitation of the rights was deficient, Treesh admitted he understood and agreed to talk.

The Court affirmed the denial of Treesh's petition.

Daoud v. Davis (Warden)
618 F.3d 525 (6th Cir. 2010)

FACTS: The body of Teriza Daoud was found in a dumpster in Toledo, OH, in 1985. Her son, Daoud was identified as a suspect, but never arrested. In 1994, he "spontaneously confessed to the murder to a 911 operator and to two Detroit police officers after jumping in front of their marked vehicle." He was given and waived Miranda, and gave a detailed account, which he repeated at the station. Two officers from Toledo went to interview him. He refused to speak to one of the officers, but did give a "detailed, tape-recorded account of the murder, including details about the disposal of the body and his attempts to clean up the evidence" to the other.

Daoud was charged with murder and found incompetent. A separate hearing was held to determine if he was competent when he gave the actual confession. Ultimately the trial court excluded the confessions, finding that he did not knowingly and intelligently waive his Miranda rights but apparently found him to be competent.

The Michigan Court of Appeals reversed, finding that the statements prior to his transport to the station were not the result of a custodial interrogation. The Michigan Supreme Court reversed the entire decision and found all of the statements admissible.

Daoud was convicted and appealed. Ultimately, he appealed his conviction to the federal courts under a writ of habeas corpus.

ISSUE: Does mental illness impact the voluntariness prong of Miranda?

HOLDING: No

DISCUSSION: Daoud contended that he did not knowingly and intelligently waive his Miranda rights. The Court noted:

[136] 459 U.S. 42 (1982).

> In Miranda v. Arizona, the Supreme Court established "certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation."[137] However, a suspect may waive his Miranda rights "provided the waiver is made voluntarily, knowingly, and intelligently." This inquiry "has two distinct dimensions."[138]

The Court noted that it was not free to substitute its own judgment, unless the trial court did not clearly follow established law. The Court found no reason to find that was the case. The Court agreed the "mental illness does not affect the voluntariness prong under Miranda."[139] However, it had not decided the extent to which "mental illness can impact the knowing or intelligent prong."[140] The experts disagreed on whether Daoud's waiver was competent and ultimately the trial court found that it was. The Court upheld that decision.

Daoud's conviction was affirmed.

INTERROGATION - RIGHT TO COUNSEL

Cornelison v. Motley (Warden)
2010 WL 3521951 (6th Cir. 2010)

FACTS: Cornelison was arrested for the November 4, 1997, "beating death of Ricky Noland in Richmond." He gave a videotaped statement in which he was given and waived Miranda and "proceeded to make self-incriminating statements." He moved for suppression and the trial court reviewed the tape. The trial court made the following factual ruling:

> In this case, the detective commences reading the requisite Miranda rights to the defendant. The defendant inquires, "What if I want my lawyer present first?" The detective responds[,] "that's up to you." Detective Pedigo repeated for the defendant that he had the right to stop the questioning at any time in order to have a lawyer present. After some conversation, the defendant commences writing on the waiver form and then says, "I would like to have a lawyer, though, I want that on the record" and writes on the waiver form. . . . [At the suppression hearing,] Detective Pedigo testified that he was unsure and wanted to clarify the defendant's intent when he next asked, "Do you want your lawyer present or do you want to talk to us . . . whichever you want to do." Then the defendant completed the form and laid down the pen. Detective Pedigo responded with, "Does that mean that you want to talk to us?"; and the defendant nods his head. The detective says, "Is that a yes?", and the defendant answers, "Yes."

Cornelison then stated that he "got his kicks in" when two others beat Noland. The trial court refused to suppression, finding his statements "merely a clarification of his rights and not an

[137] Duckworth v. Eagan, 492 U.S. 195 (1989).
[138] Colorado v. Spring, 479 U.S. 564 (1987) (quoting Moran v. Burbine, 475 U.S. 412 (1986)).
[139] Colorado v. Connelly, 479 U.S. 157 (1986)
[140] Moran, supra.

invocation of his right to counsel." The Court found that "a reasonable officer would not have understood Cornelison to have invoked his Sixth Amendment right to counsel."

Cornelison was convicted of murder and appealed. Ultimately, the Kentucky Supreme Court affirmed the conviction. After further proceedings, Cornelison filed for habeas, arguing that the confession should have been suppressed. The District Court denied the motion and he was given leave to appeal.

ISSUE: Must an invocation of the right to counsel be unequivocal?

HOLDING: Yes

DISCUSSION: "Cornelison argues that his request for counsel was unambiguous when he stated, according to the transcript of the confession tape made by his lawyer that was provided to the *habeas* court, "Uh, you know what I'm saying I want my lawyers to be here to know what I'm talking about first of all, you know what I'm saying," and "I would like to have a lawyer, I would like to have that on record, I would like to have my lawyer here so." He contends that Kentucky's finding to the contrary was in improper application of clearly established federal law.

Because Cornelison did not provide the tape to the court, for unexplained reasons, the Court could not evaluate it. It noted that the "essence of Cornelison's claim is that the police continued to interrogate him in violation of federal law after he invoked his right to counsel." The Court agreed that:

> Under Edwards v. Arizona, once a custodial suspect invokes his right to counsel, the police may not further interrogate him until counsel has been made available unless the suspect initiates further communication.[141]. Furthermore, in Davis v. U.S., the Supreme Court held that the immediate cessation of interrogation is triggered by a clear and unambiguous request for counsel.[142] If a suspect makes an ambiguous or equivocal assertion of his right to counsel, questioning may continue.[143] Thus, a suspect must assert his right to counsel "with sufficient clarity that a reasonable officer would perceive it as such under the circumstances."[144] The inquiry is objective. Significantly, the suspect must "make some affirmative 'statement' or 'request' whose ordinary meaning shows his desire to deal with the police through counsel."[145] For example, we have held that a statement such as "maybe I should talk to an attorney by the name of William Evans" triggers the Edwards prohibition on further custodial interrogation.[146] However, "an accused's

[141] 451 U.S. 477 (1981).
[142] 512 U.S. 452 (1994).
[143] Id.; see also Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) ("An 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence." (quoting North Carolina v. Butler, 441 U.S. 369 (1979)).
[144] Franklin v. Bradshaw, 545 F.3d 409 (6th Cir. 2008) (citations omitted); see also U.S. v. Hurst, 228 F.3d 751 (6th Cir. 2000) (applying Davis to the invocation of both the right to counsel and the right to remain silent).
[145] U.S. v. Suarez, 263 F.3d 468 (6th Cir. 2001) (citations omitted); see also Edwards, supra, (indicating that the request must show the suspect's "desire to deal with the police only through counsel").
[146] Abela v. Martin, 380 F.3d 915 (6th Cir. 2004).

> *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."[147]

The Court found that the "sequence of events also undermines Cornelison's contention that his conversation with the police, after he requested counsel, should not render his request ambiguous and equivocal." The Court agreed that "that Cornelison failed to make a statement that a reasonable officer would have understood to be an unambiguous or unequivocal request for counsel." As such "the decision of the Kentucky Supreme Court was neither contrary to nor involved an unreasonable application of clearly established federal law."

The District Court's decision was affirmed.

INTERROGATION - RIGHT TO SILENCE

Simpson v. Jackson
615 F.3d 421 (6th Cir. 2010)

FACTS: On October 27, 1997, a home in Columbus, Ohio, was firebombed. One child died in the fire and another was seriously injured. Simpson was charged as an accessory to the crime. While incarcerated for an unrelated crime, he was questioned. No Miranda warnings were given prior to the statements. Two other statements were made two months later, at police headquarters, and he was given Miranda and waived prior to the statements. All of the statements were recorded. During the first statements, Simpson implicated two other individuals. The investigators arranged for Simpson's release on probation to encourage him to cooperate. He "failed to cooperate, leading the officers to believe that [he] had more to do with the fire than he was admitting." He was arrested again, when he failed to abide by the terms of his release, and taken to the police station, where the second two statements were given. At that time, he admitted his involvement in setting the fire. All of the statements were admitted, over objection.

Simpson was ultimately convicted and appealed. He filed for habeas relief.

ISSUE: Does the subject asking questions after invoking a right to silence negate that invocation?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court looked at each statement, but considered the June statements first. On June 16th, Simpson was ostensibly arrested for violating his release - and the Court noted, "[t]his presented a situation in which Kallay and Ozbolt could exert significant pressure through the potential consequences of his release violations in order to get Simpson to cooperate in the arson investigation." The officer began to read him his rights, although Simpson begged him not to do so. The officer finished the rights and gave him a copy, which Simpson indicated he understood. When the officer asked if he wanted to waive the rights, however, Simpson responded in negative ways, shaking his head and making statements like "nah" and "I messed up last time I did that."

[147] Smith v. Illinois, 469 U.S. 91 (1984).

> Following four to five seconds of silence, the officer said, "Well that's up to you, whether you want to talk to us or not, we're not going to twist your arm or anything like that." Simpson *immediately* responded, "what y'all wanna talk about?" and the officer stated, "just basically what we're talking about now." We will refer to the colloquy up to this point as the "first Miranda interaction." Everything that follows will be referred to as the "second Miranda interaction."

Simpson then questioned the officer in detail about his current situation. "Critically, the officer did not ask Simpson any substantive questions, instead only responding to Simpson's questions and explaining that he was arrested for violating the terms of his release." When another officer returned, he asked if Simpson wanted to talk, and again proceeded to give Miranda warnings. Simpson told him that the other officer had already done so. He was again given a waiver of rights form.

> At this point in the interview, it is apparent that Simpson was still struggling with the fact that, while he has been arrested for violations of his release conditions, the interview is more about the arson. He indicated the waiver of rights form and said, "this thing right here, I mean, talking about 'may be used against me.' For what?" The second officer responded, "Well what would happen if you came out and said that, you know, 'I killed one of the people with [inaudible].' Then, you know, if you tell us that, and we didn't advise you of your right, we'd lose that statement in court." Simpson then executed the waiver of rights form.

Simpson argued that he had invoked his right to silence during the first interaction, but the warden argued that at that point, "Simpson's inclinations remained unclear." The Court agreed that if it had ended at that point, "the warden would likely be incorrect that Simpson's desire to remain silent was in doubt." However, the "analysis does not end there." The Court found that "viewed in its entirety, we conclude that the officer honored Simpson's initial inclination to remain silent because the officer did not ask any material questions and, instead, only responded to Simpson's inquiries. Once the other officer returned, they returned to the issue of Miranda and Simpson executed the waiver of rights form."

The Court concluded that the officers' actions were appropriate - since they did not ask him any substantive questions about his apparent invocation until they were able to clarify (by his consent) that he did not wish to invoke the rights.[148] "Though Simpson's is not a case of unsolicited statements, the Edwards line of cases is relevant for what it assumes—that it is permissible for the officers still to be in the same room with the interviewee for at least some period of time after he invokes his right to remain silent. The officers need not immediately leave the room; they simply may not continue questioning or badgering the suspect."

Simpson also argued that the officers "used a combination of threats and promises, which had the cumulative effect of overbearing his will." The Court considered the voluntary nature of a confession.[149] and noted that "it is clear that a defendant faces an uphill climb when, as here, he

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[148] Davis v. U.S., supra.

[149] Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Lynumn v. Illinois, 372 U.S. 528 (1963); see also Ledbetter v. Edwards, 35 F.3d 1062 (6th Cir. 1994).

argues that a confession was involuntary even though he properly received and waived his Miranda rights." The Court found that more recent cases (than Lynumn) teach that it is "much more difficult to argue the involuntariness of a confession" when Miranda warning have been given and waived.

With respect to the June 20th statement, he again argued that although he waived his rights, he was discouraged from seeking an attorney. The Court found the facts "not materially distinguishable from the facts in Kyger v. Carlton."[150] The Court also looked to Williams v. Withrow, in which an officer made a deal that if the suspect told them everything and it was confirmed on a polygraph, they would let him "walk."[151] In Simpson's case, however, he was never told he would not be charged in the arson, only that they would let him bond out on the violation of the earlier agreement. The Court agreed that everything the officers told him was "the truth about his predicament" and they were "merely informing Simpson of the options before him." The Court agreed that it did not render a confession involuntary if a suspect is told the truth "or that officers may inform an interviewee of reality only when that reality is bright and cheery."[152]

The Court agreed the June 20th statements were not inadmissible under the circumstances. However, Simpson also argued there was a right to counsel issue, since he was essentially given to understand that if he wanted an attorney, he would not be able to take the polygraph on the scheduled day and would be immediately charged with murder. This statement was materially identically to the statements made in Kyger. His request was equivocal and the officer properly asked for clarification. The warden's proferred attempt to distinguish the case from Kyger "would be to accept a rule that police *may not* discourage interviewees from persisting with their request for counsel *after* they have already requested counsel, but *may* preemptively discourage them from seeking the advice of counsel after informing them of the right to counsel but before they actually request counsel." The officer's statement that he only needed an attorney if he was planning to lie "crossed the line from stating the truth to distorting the truth and, arguably, to giving legal advice." The Court agreed that under this argument, the June 20th statement was inadmissible.

With respect to the April statements, the Court noted that the trial courts had held that he was not in Miranda custody at the time, although he was in prison. The Court agreed that although there was a string of state cases to the effect that "simply being incarcerated does not, by itself, constitute custody for Miranda purposes," that was "contrary to factually indistinguishable Supreme Court case law."[153] The Court agreed that "restricting Miranda protections to those that are in custody for the case under investigation would go 'against the whole purpose of the Miranda decision' and that there was 'nothing in the Miranda opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.'" Since the "statements were, by far, the most damning evidence against him," as there "was no physical evidence or eyewitness linking him to the arson," they were certainly material evidence.

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[150] 146 F.3d 374 (6th Cir. 1998).
[151] 944 F.2d. 284 (6th Cir. 1991).
[152] McCalvin v. Yukins, 444 F.3d 713 (6th Cir. 2006).
[153] Mathis v. U.S., 391 U.S. 1 (1968).

Although his responses in the April statements were not inculpatory, they were incriminating in that they were responses that the prosecution sought to use at trial.[154] As a result, the Court found that his convictions for aggravated murder, murder and attempted murder must be voided but he could still be convicted of aggravated arson and assault based upon the one statement held to be admissible.

42 U.S.C. §1983 - CORONER LIABILITY

Albrecht v. Treon
617 F.3d 890 (6th Cir. 2010)

FACTS: The son of the Albrechts died in Clermont County, Ohio. His remains were autopsied and the brain removed for examination. The examination required that the brain be soaked in a solution for up to 14 days, to firm up the brain tissue for dissection. In this case, as was the norm, the body was returned to the next of kin for burial "for disposition without the brain." The family was not told this was the case, however, and once it was examined, the brain was destroyed "in accordance with the coroner's usual practice." The family learned of it only months later, when they received a copy of the coroner's report.

The Albrechts sued the coroner and related parties under 42 U.S.C. §1983, and the case was certified as a class action, with the Albrechts serving as the representative for a class of similarly-situated family members who received bodies "missing tissues or organs that the coroner retained for further study in the course of a criminal investigation." There was also, apparently, a separate action under Ohio State law.

The District Court found in favor of the defendants, including Treon, on the pleadings. The Albrechts appealed on behalf of the class.

ISSUE: Is there a federal right to a family member's body parts after death?

HOLDING: No

DISCUSSION: The issue on appeal is if "the Albrechts had a constitutionally protected property interest in their son's brain after it was removed during the autopsy." Ohio state law did not provide any protected right to any body parts retained for forensic examination and testing. The Court looked to related cases, Brotherton v. Cleveland[155] and Whaley v. County of Tuscola[156], under which courts had supported a limited right to a family member's body parts, but in both cases, the parts were moved for anatomical donation, not for forensic analysis. The court looked to Waeschle v. Dragovic, decided under Michigan law, which also held there was no constitutional right to body parts.

The court agreed that "federal law is clear that the states define property rights in their respective jurisdiction." Since Ohio held that the next of kin lacked any rights to "autopsy specimens removed

[154] Kyger, supra.
[155] 923 F. 2d 477 (6th Cir. 1991).
[156] 58 F.3d 1111 (6th Cir. 1995).

and retained by the coroner, in furtherance of a criminal investigation, there was no federally protected rights to those body parts." The Court upheld that decision.

42 U.S.C. §1983 – EXIGENT ENTRY

Johnson v. City of Memphis
617 F.3d 864 (6th Cir. 2010)

FACTS: On April 22, 2004, Officers Adams and Rice (Memphis PD) were dispatched to a 911 hang[up] call. Rice arrived and found the "front door wide open." He announced his presence and "entered with his weapon drawn." Adams pulled up and followed Rice, also with his weapon drawn. "At some point after the officers entered, a second call came in to dispatch with sufficient information to classify the call as a 'mental consumer.'"

The officers agreed that "they should sweep the building to make sure that no one was hurt or in need of assistance." As they went around a corner, Johnson appeared, and Rice (who is now deceased) asked him why he "did not respond to the officers' calls." "Johnson did not answer, but instead jumped on Rice and a fight ensued." Johnson grabbed Rice's gun hand and Rice yelled that fact to Adams. "Adams shouted repeatedly at Johnson to get down, then fired twice at Johnson." After Adams fired, Johnson threw Rice into a wall and charged at Adams. Adams retreated, yelled at Johnson to get down, and continued to fire, but "Johnson reached him and hit him with enough force to throw Adams against a wall and knock him out briefly." "When Adams came to his senses, Johnson was dead at his feet."

They later learned that "Johnson was not ordinarily dangerous, but was bipolar and off his medication." The 911 caller was Monica Johnson, the decedent's widow, who had left the house as soon as she called. She called back from another location and was apparently the individual who provided the medical information concerning Johnson, but this information was either not received, or not relayed, in a timely manner to the officers at the scene.

Monica Johnson filed suit against the officers and the City of Memphis. The District Court dismissed all claims. She later tried to reinstate the claim against the dispatcher for negligence in not relaying the information quickly enough to prevent the shooting. Johnson appealed.

ISSUE: Is a 911 hang-up call sufficient exigent circumstances to justify an exigent entry?

HOLDING: Yes

DISCUSSION: The Court began, noting that "exigent circumstances arise when an emergency situation demands immediate police action that excuses the need for a warrant." In Welsh v. Wisconsin, the Court had recognized "four situations that may rise to the level of exigency: (1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect's escape, and (4) a risk of danger to the police or others."[157] More recently, the Supreme Court recognized another "exigency obviating the requirement of a warrant is the need to assist persons

[157] 466 U.S. 740 (1984); U.S. v. Radka, 904 F.2d 357 (6th Cir. 1990); U.S. v. Johnson, 22 F.3d 674 (6th Cir. 1994).

who are seriously injured or threatened with such injury."[158] That was reiterated in Michigan v. Fisher, in which the court held that officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[159]

The court agreed that officers do not need "ironclad proof" nor do they "need to wait for a potentially dangerous situation to escalate into public violence in order to intervene." The Court noted that a "911 hang call with an unanswered return call from the dispatcher has been found to be sufficient to justify an officer's objectively reasonable belief that someone inside the residence is in immediate need of assistance." Combined with the open door, the Court found that the trial court was "correct in finding that the police were justified in entering the home to sweep for a person in need of immediate assistance under the emergency aid exception." In fact, the "whole point of the 911 system is to provide people in need of emergency assistance an expeditious way to request it," and misusing the system is a crime in most jurisdictions. The Court agreed that "911 hang-up calls *do* convey information" – "that someone physically dialed 9-1-1, the dedicated emergency number, and either hung up or was disconnected before he or she could speak to the operator." When a return call goes unanswered, it points "to a probability, perhaps a high probability, that after the initial call was placed the caller or the phone has somehow been incapacitated." This leads to a reasonable belief that someone needs assistance.

The court found it "objectively reasonable for the police in this situation given the information they had, to enter the house." The court rested this decision on the specific facts and declined to make a per se rule for all 911 hang calls, however.

The court upheld the dismissal of the dispatch negligence claim due to the city's immunity under Tennessee law. The summary judgment in favor of the officers and the city was affirmed.

42 U.S.C. §1983 – BRADY

Elkins v. Summit County, Ohio
615 F.3d 671 (6th Cir. 2010)

FACTS: Elkins was convicted of the 1998 rape and murder of Johnson, and the rape and assault of her 6-year-old daughter, Brooke in Barterton, Ohio. Because Brooke stated the "rapist looked like her uncle, Elkins, the Barberton police arrested Elkins."

While the investigation was ongoing, Mann was arrested for robbery. He was drunk, and asked Officer Antennuci, "Why don't you charge me with the Judy Johnson murder?" In compliance with training and policy, the officer wrote and sent a memo and directed it to the department investigating the murder. Procedure dictated that such memo would be reviewed and disseminated to the appropriate detectives. "However, the Mann memorandum was not disclosed to Elkins or the prosecution and was never produced."

At trial, Brooke identified Elkins, but he produced substantial evidence that he was elsewhere at the time. Most significantly, hairs found on both victims did not match Elkins. He was, however,

[158] Brigham City v Stuart, 547 U.S. 398 (2006).
[159] 130 S.Ct. 546 (2009).

convicted. In 2002, Brooke recanted her testimony. "The same year, through a series of breathtaking improbable coincidences, Elkins began to suspect that Mann was Johnson's murderer" and was able to obtain a DNA sample from him. (The two were incarcerated in the same facility at the time.) Testing proved that Mann was the perpetrator and he eventually pled guilty. Elkins was released and he was found to have been wrongfully imprisoned, and won a settlement in his claim to that effect.

In 2006, he sued a number of officers and the City of Barberton. Some of the claims were dismissed, but the Court denied a motion for summary judgment with respect to the §1983 due process claim. The trial court noted that at the stage of the proceeding, "it must infer that the detectives both received and failed to disclose the memorandum, and that the failure to disclose the memorandum violated Elkins' right to due process." The Court also found sufficient evidence to support a claim of malicious prosecution under Ohio law. Cross-appeals followed.

ISSUE: May the failure to disclose exculpatory evidence trigger federal civil liability?

HOLDING: Yes

DISCUSSION: Elkins claimed that the failure of the officers to disclose the memorandum deprived him of a fair trial. The officers either denied "having seen the memorandum or did not testify at trial," but "did not contest that Antenucci created and dispatched the memorandum to the Detective Bureau in accordance with department policies." No other relevant document in the case seemed to be missing and that the actual incident report on Mann's involvement with the robberies was received and preserved.

The Court assumed the officers received the memorandum, and agreed that the prosecution (and by extension the police) is required to disclose exculpatory evidence.[160] That right was already clearly established in 1999. The Court further agreed that the "exculpatory value of the Mann memorandum would have been apparent to the detectives given the state of the case at that time." Specifically, the Court noted that the case against Elkins was flimsy and detailed suspicious actions taken by Mann and his wife. (The couple lived next to Johnson at the time.)

The Court affirmed the District Court's denial of summary judgment.

42 U.S.C. §1983 – FALSE ARREST

McCumons v. Marougi
385 Fed.Appx. 504, 2010 WL 2777270 (6th Cir. 2010)

FACTS: On August 10, 2007, Officer Marougi (Pontiac, MI, PD) went in plainclothes to a park to investigate "open sexual activity." McCumons saw him drive past; the two nodded at each other. The officer then parked nearby. McCumons drove around the park and parked, and again, the officer drove past and they made eye contact. Officer Marougi continued past and parked near the front of the park. McCumons drove in that direction and spotted the officer's car, so he stopped to say hello. They "exchanged pleasantries" and allegedly the officer "asked McCumons what

[160] Brady, supra.

would make it a 'better day.' They continued "flirting" and started discussing what they liked and were "looking for." Allegedly the officer said he did "oral." After several more minutes the officer moved his car into some tall grass and McCumons pulled up nearby. He "rolled down the passenger window and told Marougi that he had seen a police officer nearby (little did he know) and was going to leave, which he did."

Officer Marougi followed McCumons to a nearby flea market. He "arrested McCumons, impounded his car and released him from custody after fifteen minutes." Ultimately McCumons was charged with soliciting. He paid $785 to redeem his car (with was seized under the Michigan statute). Eventually the criminal charges were dropped.

McCumons filed suit against Officer Marougi under 42 U.S.C. §1983. Marougi invoked qualified immunity, which was denied. Marougi appealed.

ISSUE: Does failure to demonstrate probable cause for an arrest trigger federal civil liability against the arresting officer?

HOLDING: Yes

DISCUSSION: The Court began:

> When a government official invokes qualified immunity to a 1983 action, the claimant must make two showings to overcome the defense: He must show that the officer's conduct violated a constitutional right, and he must show that the constitutional right in question was "clearly established."[161] McCumons plainly satisfies the first requirement: Officer Marougi concedes that, in retrospect, he did not have probable cause to arrest McCumons. At first blush, it might appear that McCumons just as plainly satisfies the second requirement: No one doubts that "it is clearly established that arrest without probable cause violates the Fourth Amendment."[162] But it is not that simple. The second question turns not just on whether the legal right is "clearly established" in the abstract but on whether the officer's action, "assessed in light of the legal rules that were 'clearly established' at the time it was taken," was "objective[ly] … reasonable."[163] "[R]easonable mistakes," the Supreme Court reminds us, "can be made as to legal constraints" on police officers and when that is the case, "the officer is entitled to the immunity defense."[164] The key question, then, is: did Officer Marougi make a "reasonable mistake" in concluding that he had probable cause to arrest McCumons?"

The Court concluded that he did not have probable cause, under the facts put forth by McCumons. The Court looked at the statute and McCumons' statement, and noted that, according to the statement, "it was Officer Marougi who 'invited' McCumons to engage in sexual behavior, not the other way around." The Court stated that "it was Officer Marougi who did the soliciting." the court

[161] Silberstein v. City of Dayton 440 F.3d 306 (6th Cir. 2006).
[162] Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007).
[163] Anderson v. Creighton, 483 U.S. 635 (1987).
[164] Saucier v. Katz, 533 U.S. 194 (2001).

noted that "Perhaps McCumons was amenable to the invitation, but even then he ultimately rejected it." "A reasonable officer could not think that McCumons made an invitation when he was the one invited and he was the one who declined."

The officer argued that the Court " should consider not just the words exchanged but the non-verbal setting in which they were uttered." He continued, arguing "gestures, facial expressions, tone of voice and other contextual clues … might cast a different light on the conversation." The Court agreed that the statute does include those "other means." However, "Marougi has only himself to blame for [the Court's] inability to take him up on this invitation," because the record "does not contain any such facts, and we may not assume their existence to the detriment of the moving party." Had he filed an affidavit to these details, "that might be a different matter." However, the Court "cannot credit factual allegations never made and … cannot draw inferences in favor of the officer and *against* the moving party."

The Court concluded that this was not a close call, since if McCumons' account is true, no reasonable officer could have believed he'd been invited to have sex - "when the officer made the sexual advances and when McCumons was merely receptive to them."

The Court noted that, "consistent with its duty at this phase of the litigation, the court gave McCumons the benefit of all inferences in determining whether, as a matter of law, Officer Marougi merely made a 'reasonable mistake' in arresting him." The Court noted that the jury would be free to resolve the conflicting accounts.

The court upheld the rejection of the qualified immunity claim at this stage of the proceedings.

42 U.S.C. §1983 – USE OF FORCE

McKenna v. Edgell
617 F.3d 432 (6th Cir. 2010)

FACTS: The court drew on the District's Court denial of summary judgment for the "operative facts."

> In the early morning of March 18, 2004, Scott McKenna was suffering from a seizure in his home in Royal Oak, Michigan. At that time, McKenna was a single father living with his three daughters, Alexandra, Samantha, and Jessica. Alexandra, his then fourteen-year-old daughter, called 911 and told the dispatcher that she thought her father may be having a seizure or choking. Officers Edgell and Honsowetz were dispatched to assist a man having trouble breathing. The officers arrived before any other emergency personnel. Alexandra directed the officers to McKenna's bedroom, where they found McKenna lying in bed.
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> The course of events after the officers entered McKenna's bedroom is disputed. Alexandra testified that she "couldn't see exactly what was going on" for some period, because she was talking to one of the officers. However, she also testified that this period was "for about a minute . . . . So I was standing there watching it

> all." According to Alexandra, the officers instructed Scott McKenna to get out of bed and to get dressed. McKenna got up and started to pick up his pants, but then sat back down on the bed and began to lie back down. Alexandra testified that the officers then "picked him up by his hands, and they like pulled him up from the ground and told him to put his pants on." McKenna then sat back down and, according to Alexandra, "was telling them to stop."
>
> According to Alexandra, the officers continued to try to get McKenna out of bed while McKenna "just laid back down." Finally, Alexandra testified, the officers handcuffed McKenna's wrists and ankles, and only then did McKenna begin struggling with them.
>
> Contradicting the testimony offered by McKenna's daughter, the officers said that after they found McKenna unresponsive to verbal questioning, Officer Edgell placed his hand on McKenna's upper arm or shoulder to try to rouse him. Officer Edgell testified that when McKenna did rouse he immediately became aggressive and violent, pushing them and causing Officer Honsowetz to fall backwards. The officers asserted that it was necessary to handcuff McKenna because of his violent behavior. Firefighters arrived as the officers were already restraining McKenna. Scott McKenna has no recollection of the events that took place during his seizure.

His daughter also stated that "when the officers arrived, one of them asked her whether McKenna was on drugs and whether he had assaulted her." She denied both. After he was taken from the premises by EMS, the "two officers searched through McKenna's bathroom medicine cabinet and the top drawer of his dresser." Items were knocked around and thrown away during the search, including some memorabilia. The officers testified they were looking for prescription or illegal drugs. One of the officers "admitted that even in responding to medical emergencies, he is always aware that criminal activity may be involved and he is 'always looking to investigate it.'"

The Court noted conflicting evidence as to the proper medical protocol for such calls. "McKenna's witnesses stated that the appropriate response to a medical seizure is not to restrain the subject but rather to clear the area and let the episode run its course. A firefighter testified, '[w]e don't handcuff patients.' Firefighters and paramedics testifying for the defendants stated that they are trained to initiate physical contact to rouse a nonresponsive subject, to restrain the subject for safety if necessary, and to look for indications in the environment that might explain the subject's condition."

McKenna filed suit, claiming a deprivation of rights under the Fourth Amendment and 42 U.S.C. §1983. The court dismissed the city on a failure to train allegation, but refused to dismiss Edgell and Honsowetz under qualified immunity. "The officers moved for summary judgment a second time, arguing that because they had acted in response to a medical emergency, they were qualifiedly immune from suit under Peete v. Metropolitan Government of Nashville and Davidson County[165]." The Court found that "the facts did not make clear "that the police officers were attempting to provide medical assistance."

[165] 486 F.3d 217 (6th Cir. 2007).

The case proceeded to trial and McKenna won, but his jury award for pain and suffering was later reduced substantially. Both parties appealed.

ISSUE: May an officer who commits excessive force during a medical response be subject to federal civil liability?

HOLDING: Yes

DISCUSSON: First, the Court reviewed the issue of qualified immunity. The Court began:

> Whether government officials performing discretionary functions are entitled to qualified immunity involves two questions: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established."[166] In accordance with this framework, the officers advance two independent reasons why qualified immunity applies to them:
>
> First, as responders[167] to a medical emergency, they assert that they are immune from suit under Peete, which held that liability under the Fourth Amendment for torts committed by firefighters, paramedics, and emergency medical technicians ("EMTs") in the process of responding to a medical emergency is not clearly established. Second, the officers argue that McKenna was incapable of submitting to any show of authority, such that he could not have been "seized" within the meaning of the Fourth Amendment.

In Peete, the plaintiff died because of what would arguably be medical malpractice by unqualified providers.

The Court continued:

> There are two ways to think about whether Peete applies to the facts of the instant case. First, as argued by McKenna, the fact that the defendants here are police rather than medical-care personnel may render Peete inapplicable.[168] As a general matter, exposure to liability does not depend merely on the profession of the government actors. It would not be coherent, for example, to say that paramedics who strap a patient to a gurney without medical need, search his home for evidence of a crime, and forward what they discover to the police do not violate the Fourth Amendment, simply because they are paramedics. On the other hand, the fact that a government agent is a police officer clearly matters in some cases—

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[166] Everson v. Leis, 556 F.3d 484, 494 (6th Cir. 2009).

[167] The Court stated: "The defendants here refer to such persons as "first responders." We eschew that term, as it unduly emphasizes the fact that these individuals get to a scene first rather than the fact that they go there to provide medical support—the critical element of their engagement for the purposes of Peete's applicability.

[168] The Court stated: "We are mindful of the challenges police officers face when acting as medical-emergency responders. Often, they are the first and only people on the scene. We acknowledge, as the district court did, the harm to the public that could result from officers' overexposure to liability for civil-rights violations. Qualified immunity is itself one way of negotiating the need to allow plaintiffs to seek relief."

> for example, when it bears on the question of whether a person is "seized" under the Fourth Amendment.[169] The officers urge us to follow the lead of two district courts that have applied qualified immunity to police based on Peete.[170] We note that these unpublished lower-court cases are not binding upon us. The instant case, however, does not require us to resolve the question. Instead, we will assume without deciding that Peete's holding could extend to defendant police officers.
>
> A second way to think about Peete is that its applicability depends on a defendant's objective function or purpose. Peete may stand for the proposition that when a government agent acting in the role of a paramedic - any medical emergency responders - commits an unreasonable search or seizure, it is not yet clearly established that the conduct violates the Fourth Amendment. There is support for this interpretation in the Peete panel's opinion. It stated that qualified immunity turns on "the specific purpose and the particular nature of the conduct alleged in the complaint."[171]

The panel held that the defendants in Peete were protected because they intended only to provide medical aid: "[t]he paramedics did not unreasonably seize [the patient] for the purpose of interfering with his liberty. They responded to [his] grandmother's call that he was experiencing an epileptic seizure and needed medical attention. They were not acting to enforce the law, deter or incarcerate." On this logic, when officers do act to "enforce the law, deter or incarcerate," qualified immunity might not apply. So reasoned the district court in denying the officers' second summary-judgment motion in the instant case: "[t]he police officers here were not necessarily offering medical assistance. Although the police officers were first on the scene and 'first responders,' it is not clear that trying to get someone out of bed and get him dressed constitutes medical assistance."

The court concluded that their qualified immunity claim depended upon "whether they acted in a law-enforcement capacity or in an emergency medical-response capacity when engaging in the conduct that McKenna claimed violated the Fourth Amendment. If the officers acted as medical-emergency responders, then McKenna's claim would amount to a complaint that he received

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[169] *See* U.S.v. Mendenhall, 446,U.S. 544 (1980) (explaining that a person is seized when the surrounding circumstances, such as "the threatening presence of several officers" are such that "a reasonable person would have believed that he was not free to leave").

[170] See Daniels v. Bowerman, No. 08-10278, 2008 WL 2743918 (E.D. Mich. July 14, 2008); Mills v. Hall, No. 06-15689, 2008 WL 2397652 (E.D. Mich. June 10, 2008).

[171] In a footnote, the court noted that it was "mindful of the challenges police officers face when acting as medical-emergency responders. Often, they are the first and only people on the scene. We acknowledge, as the district court did, the harm to the public that could result from officers' overexposure to liability for civil-rights violations. Qualified immunity is itself one way of negotiating the need to allow plaintiffs to seek relief and the need to protect law enforcement: even if officers violate a person's constitutional rights, they will be shielded from suit unless the rights violated were clearly established and a reasonable police officer would have known of them. Moreover, we believe that the framework applied here offers the sensible middle ground sought by the district court: on the current state of the law, police accused of violations like those involved in the instant case receive immunity when they act as medical responders but not when they act in a law-enforcement capacity. To be sure, they may have to convince a jury of the role they objectively played, but the obligation to persuade a jury exists in all cases in which qualified immunity turns on disputed facts."

dangerously negligent and invasive medical care. Under a function-dependent view of Peete, if any right to be free from such unintentional conduct by medical-emergency responders exists under the Fourth Amendment, it is not clearly established. If the defendants acted in a law-enforcement (e.g., investigative or prosecutorial) capacity, however, McKenna's claim does not "look[] like a medical malpractice claim," rather, his claim is that he was subject to an unreasonable seizure and search. It is certainly clearly established that police violate the Fourth Amendment when they handcuff people whom they neither suspect of criminal wrongdoing nor believe to be a danger to themselves or others."[172]

Ultimately, the Court concluded that the "objective determination of the role that the officers played at McKenna's home" is for the jury, not the judge. The Court agreed, however, that "the reasonableness of officer conduct in excessive-force cases is a question for the court." In this case, the "objective question in this case involves a highly factual characterization, not a legal concept at the center of Fourth Amendment law like reasonableness in the use of force, exigent circumstances, or probable cause." In this case, the jury "clearly found that the officers had acted in a law-enforcement capacity."

The Court concluded:

> The jury easily could have found the following: The officers arrived at the McKenna residence in response to a 911 call reporting that McKenna might be having a seizure or choking. One of the officers asked Alexandra whether her father was using drugs, whether he had assaulted her, and whether anything like this had ever happened before. The appropriate response to a medical seizure was not to restrain the subject but rather to clear the area and let the episode run its course. Instead of following that procedure, the officers handled McKenna, repeatedly attempted to get him to put on his pants, and tried to force him to rise in the face of his request that they stop. Completely unprovoked by any aggressive or dangerous behavior, they then rolled him over, pinned him on his stomach with their knees, and handcuffed his arms behind his back and his ankles. After McKenna had been taken away to the hospital, the officers searched a dresser drawer in his bedroom and the medicine cabinet in the bathroom. In the process, they knocked down everything on top of the dresser and threw out his children's baby teeth collection. One of the officers also ran a check on McKenna's license plate.

This "view of the facts" supported the jury's finding that the officers acted in a law enforcement capacity. The Court agreed that:

> Like the district court, we fail to see how it serves any medical-emergency responder purpose to persist in insisting that a medically seizing individual put on his pants. Questioning Alexandra about McKenna's possible drug use, meanwhile, is equally suggestive of an inquiry into the cause of McKenna's medical condition and of an investigation into wrongdoing. It looks more like the latter, however, given that the officer also asked Alexandra about domestic violence. Even so,

[172] U.S. v. Davis, 514 F.3d 596 (6th Cir. 2008); Monday v. Oullette, 118 F.3d 1099 (6th Cir. 1997).

> alone, these questions would make for a very close case. They are more consistent with law-enforcement behavior, however, when viewed against what happened next: the officers handled, subdued, and handcuffed McKenna at the hands and feet without any sign of violence on his part. All together, their treatment of him was consistent with their treatment of a criminal suspect believed to have abused illegal drugs. This objective characterization of the officers' conduct provides a law-enforcement purpose for handcuffing McKenna: if an individual is on drugs or otherwise given to unpredictable behavior, restraining him gives the investigating officers greater control over the situation, protects the officers, and minimizes the individual's ability to interfere with their search.[173]

Further:

> The search conduct is consistent with this law-enforcement posture. Under ordinary circumstances, the officers' search reasonably would be consistent with a quest for clues about McKenna's medical condition, information that would be valuable to his treatment. But coming immediately after the officers handcuffed McKenna without cause instead of letting the medical seizure run its course, the search looks investigatory. Indeed, Alexandra's testimony that the officers knocked down all the items on top of the dresser and threw away the baby-teeth collection is consistent with a rummage for contraband and the indifference of a raid. Their jettisoning of McKenna's personal effects does not convincingly reflect an urgency for time-sensitive medical information: McKenna had been stabilized by medical personnel and taken to the hospital.

Finally, the Court stated:

> We could hold as a matter of law that police officers who are dispatched to a location by a 911 call for medical attention—a fact emphasized by the dissent—always act in a medical-response capacity, regardless of the other facts in the record. This proposal would be an illogical and dangerous rule. It cannot be that an officer receives Peete protection simply because he was invited to the scene of a medical emergency. This proposition overlooks the possibility that an encounter that begins as medical in nature may evolve into one that is investigatory. More importantly, such a rule would give officers who respond to 911 calls free rein to rifle through callers' homes in search of incriminating evidence and to physically abuse callers in ways unrelated to anyone's safety. We decline to immunize misconduct of this sort; instead, we allow this case to stand on the judgment of the jury, in whose hands qualified immunity cases that turn on disputed facts have traditionally rested.[174]

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[173] See U.S. v. Foster, 376 F.3d 577 (6th Cir. 2004) (holding that it was reasonable for an officer conducting a Terry stop and frisk of an individual he believed to be on PCP to handcuff that individual based on the officer's experience that "people on PCP can become extremely violent")."

[174] See Brandenburg v. Cureton, 882 F.2d 211 (6th Cir. 1989).

However, this was not the end of the assessment. The officers argued that in fact, "McKenna was not seized because he was not conscious during the incident at his home." The Court did not agree that his "complete lack of memory about the incident" was critical as it is "possible for a person to be conscious during an experience and yet not remember it." Moreover, Alexandra testified that at one point, her father told the officers to "stop."

Finally, the Court concluded that "[t]he officers do not contend that McKenna's home was never "searched" under the Fourth Amendment. The record contained ample evidence to support the determination that the officers unreasonably searched the home and seized McKenna. As described above, both actions violated clearly established constitutional rights, and the denial of qualified immunity was appropriate.

The Court upheld the plaintiff's award, including the reduced remittitur which he had appealed.

42 U.S.C. §1983 – DAMAGE TO PROPERTY

Spangler v. Wenninger
2010 WL 3069600 (6th Cir. 2010)

FACTS: In 1997, Doan was convicted of the kidnapping and murder of Culberson, in Clinton County, OH, but her body was never found. In 2004, the Clermont County OH SO received a reliable tip that the body could be found "near or under the garage on Spangler's property, in Brown County." Messer, Spangler's son, lived on the property and ran a business until he was jailed in 2003; vehicles and materials for his business were stored in the garage. Spangler had since rented the property to tenants, although apparently, Messer's belongings remained in the garage.

On April 27, 2004, the sheriff's offices in Clermont and Brown Counties collaborated on a search warrant and a search warrant was obtained to search for the body. The FBI also assisted with the search, which began that same day. It was accepted that Sheriff Wenninger (Brown County) was generally in charge, but others stepped in when he was not available, including Sheriff Rodenberg (Clermont County).

The search began with drilling holes in the concrete floor of the garage and cadaver dogs were brought in to check the holes. If the dogs indicated on cadaver scent, deputies would dig in those areas. On April 29, items were moved from the garage to facilitate the search, including several vehicles. On May 1, the remaining contents of the garage were removed and placed outside.

The dirt removed was searched and then piled outside. By May 3, there was a large hole in the garage, which filled with water. As the search went on, Spangler "became concerned about the structural integrity of the garage." Wenninger, apparently knowledgeable about construction, reinforced the structure. They ran out of space and began piling dirt on top of the items places outside, including the vehicles, (Two of the defendants later testified they considered the items to be junk.) "Dunn [Brown County deputy] testified that the officers knew that they were damaging the property by piling dirt on it." Spangler argued that there was plenty of space to move the property to safety or, in the alternative, pile the extracted dirt where it would do no damage.

On May 11, the search ended, with no body having been found. They did not fill in the hole, which was, by that time, 15 feet deep. Sheriff Wenninger agreed that he knew the hole would fill with water, but "he advised the law enforcement personnel that they were not required to fill it." During this same time, the tenant's vacated the property, because the septic system became damaged by the search as well.

The Spanglers (husband and wife) filed suit against Brown and Clermont county defendants, including both sheriffs. The trial court dismissed most of the defendants, but denied summary judgment to Sheriffs Rodenberg and Wenninger. They appealed.

ISSUE: Does a search warrant permit intentional, unnecessary destruction of property?

HOLDING: No

DISCUSSION: The Court looked to the standard for qualified immunity. "Qualified immunity shields government officials performing discretionary functions from 'liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[175]

Further:

> A defendant enjoys qualified immunity on summary judgment unless the facts alleged and the evidence produced, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established.[176] A right is "clearly established" if "[t]he contours of the right [are] sufficiently clear that a reasonable officer would understand that what he is doing violates that right."[177]

The Court looked to the first question, and noted that the claims are premised on the "seizure of [the Spanglers'] personal property and garage, which affected their possessory interests in said property." The Court identified that a "seizure occurs when 'there is some meaningful interference with an individual's possessory interests in that property."[178] The Court agreed that destruction is certainly a "meaningful interference." As such, the Court had to determine if the damage was sufficient to present the case to the jury.[179] The Court noted that photos show that "the property was left in complete disarray with piles of dirt placed all over [the Spanglers'] vehicles and property." Further, it noted that there was plenty of other space on which to pile the dirt, and that they could have sought to expand the search warrant for that purpose. "The totality of the circumstances did not warrant the knowing destruction of [the Spanglers] personal property by unnecessarily piling dirt on it, and failing to fill the large hole that remained in the garage." In addition, the Court agreed that the "Supreme Court established that the unreasonable destruction

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[175] Feathers v. Aey, 319 F.3d 843 (6th Cir. 2003); Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[176] Jones v. City of Cincinnati, 521 F.3d 555 (6th Cir. 2008); Saucier v. Katz
[177] Anderson v. Creighton, 483 U.S. 635 (1987).
[178] Soldal v. Cook County, 506 U.S. 56 (1992); U.S. v. Jacobsen, 466 U.S. 109 (1984).
[179] Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989).

of property may be a meaningful interference with personal property constituting an unconstitutional seizure under the Fourth Amendment."[180] The two sheriffs both supervised and even directly participated, in Wenninger's case, in the actual search – as 1983 liability can't be premised simply on the basis of their status as supervisors/employers. The Court agreed that denial of qualified immunity was appropriate.

The Court affirmed the denial of qualified immunity for Sheriff Wenninger and Rodenberg.

TRIAL PROCEDURE / EVIDENCE - CRAWFORD

U.S. v. Sutton / Turner
2010 WL 2842745 (6th Cir. 2010)

FACTS: Sutton and Turner were involved in an elaborate tobacco selling scheme. They were indicted, along with others, under federal law in Tennessee. Most pled guilty, but Sutton stood trial. He was convicted and appealed.

ISSUE: Are recorded statements of a government informant always testimonial?

HOLDING: No

DISCUSSION: Among other issues, Sutton argued that his Confrontation Clause rights were violated when tape recordings, the testimony of government agents and rough notes were admitted as evidence. The tape recordings, which were captured by secret tape recordings made with the cooperation of one of the other defendants, included incriminating statements made by Sutton.

Sutton argued that the statements were testimonial because the subject wearing the wire was cooperating with the government. The Court, however, has consistently rejected the contention that the presence or participation of a government informant or agent makes all recorded comments testimonial."[181] The Court agreed that the statements by any of the co-conspirators, other than Bowen [wearing the wire], are non-testimonial because the co-conspirators did not know they were being taped, and no Crawford error arose from their admission. Furthermore, despite Sutton's arguments otherwise, because non-testimonial out-of-court statements do not implicate the Confrontation Clause, this court does not need to determine whether the statements of the co-conspirators (other than Bowen's) comport with Ohio v. Roberts[182] or Bruton v. U.S.[183]

Thus, only Bowens' statements were at issue, and the "government conceded that Ron Bowen's statements were testimonial, which was correct since Ron Bowen would have reasonably believed that his statements would be used against Sutton and other co-defendants (including Bowen himself)." The trial court had admitted his statements because they were offered to "provide context, not to establish the truth of the matter asserted." It gave a limiting instruction to the jury each time the information was admitted. The Court agreed that "no Confrontation Clause violation

[180] Jacobsen, supra; Soldal; Thomas v. Cohen, 304 F.3d 563 (6th Cir. 2002).
[181] U.S. v. Mooneyham, 473 F.3d 280 (6th Cir. 2007), U.S. v. Johnson, 581 F.3d 320 (6th Cir. 2009).
[182] 448 U.S. 56 (1980)
[183] 391 U.S. 123 (1968).

occurs when statements by a government informant are admitted to provide context, not to establish the truth of the matter asserted.[184] Without his part of the conversation the statements would have made no sense.

Sutton also argued that testimony about an interview of one of the other subjects was improperly admitted. The Court agreed that "[i]t is beyond dispute that a defendant has the right to cross-examine a co-defendant when the co-defendant's testimony incriminates him, as it did here." However, Sutton never sought to cross-examine the subject.

Sutton's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – CONFRONTATION CLAUSE

U.S. v. Daniels
2010 WL 3724600 (6th Cir. 2010)

FACTS: During Daniels' federal trial in Michigan for drug trafficking and weapons, "some of the witnesses' prior convictions were redacted" from paperwork provided to the defense "and he was not permitted to cross-examine those witnesses as to those convictions." He was ultimately convicted and appealed.

ISSUE: Does the Confrontation Clause guarantee unlimited opportunity for cross-examination?

HOLDING: No

DISCUSSION: The Court noted that "although the Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him, it does not guarantee unlimited opportunity for cross-examination."[185] The trial court will "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."

In Daniels' case, the Court found that the trial judge "did not significantly limit Daniels' ability to cross-examine the co-defendant witnesses." Although it "did not allow Daniels to inquire as to the witnesses' prior convictions, it permitted and even encouraged Daniels to inquire into the relevant details of the plea agreement."

Daniels' conviction was affirmed, although errors during sentencing required the Court to remand for re-sentencing.

[184] U.S. v. Jones, 205 F. App'x 327 (6th Cir. 2006); See generally U.S. v. Hendricks, 395 F.3d 173 (3d Cir. 2005).
[185] Delaware v. Van Arsdall, 475 U.S. 673 (1985).

U.S. v. Culbertson
2010 WL 3155914 (6th Cir. 2010)

FACTS: On June 19, 2004, Officers Schrameck and McCloud were working an area in Detroit "known for playing host to frequent narcotic sales." Officers Spidell and Hernandez, on patrol, spotted two vehicles blocking the street. Culbertson was leaning into the driver's side of one of the vehicles and when he spotted the officers he "took off running." Spidell ran after him, later stating that Culbertson "had a look of 'panic.'" He saw Culbertson throw an object – at the time the officer was about 25-30 feet behind him. Culbertson was apprehended a short distance away. Officers "backtracked to recover the object that Culbertson had thrown away, and found a handgun only a few minutes later."

Culbertson was indicted for possession of the firearm. He was convicted and appealed.

ISSUE: Does the Confrontation Clause guarantee unlimited opportunity for cross-examination?

HOLDING: No

DISCUSSION: At trial, two police reports were admitted, both which contained the same error as to the address where the gun was found (Electric rather than Edsel). Both officers were cross-examined on the point and readily admitted the error. The trial court "foreclosed line-by-line comparison of the two reports" – one of which was not admitted into evidence. The jury was, however, made aware that the error was duplicated in both reports.

The Court agreed that the limiting of cross-examination did not violate the Confrontation Clause.

Culbertson's conviction was affirmed but his case was remanded for sentencing errors.

TRIAL PROCEDURE / EVIDENCE – EXPERT WITNESS

U.S. v. Harris
2010 WL 3398872 (6th Cir. 2010)

FACTS: On March 23, 2006, police questioned Harris concerning a homicide investigation. He was interviewed at his home. He admitted he sold narcotics from that home and that he owned several firearms. The police obtained a search warrant, finding several loaded weapons and crack cocaine. One of the guns was within inches of the cocaine. Harris was indicted on federal intent to distribute charges, and also charged with possession of the guns for the purpose of drug trafficking. He pled guilty to the trafficking charge but went to trial on the firearms charges.

At trial, Harris argued that the "guns were not possessed to further his drug activities." He said the guns "were necessarily near the drugs" because his apartment was so small. Sgt. Birkenhauer testified at trial that drug traffickers tended to have "cheaper small caliber handguns" in easily accessed locations, while collectors had more expensive weapons and displayed them in cases. Prior to his testimony, Harris had objected to Birkenhauer's testimony as an expert.

Harris was convicted and appealed.

ISSUE: May an expert witness testify as to the mental state of a subject?

HOLDING: No

DISCUSSION: The Court agreed that simple possession of a firearm is insufficient to satisfy the elements of the statute. The law requires more than mere proximity, but some evidence that it was owned for that purpose. The Court noted that the gun was kept close to the drugs and that all five handguns found were loaded - "not consistent with how gun collectors normally store their guns."

Further, Harris argued that Birkenhauer should not have been allowed to testify as an expert. The Court, however, noted that "law enforcement officers may testify concerning the methods and techniques employed in an area of criminal activity and to establish 'modus operandi' of particular crimes."[186] FRE Rule 704(b) does prevent "an expert witness from testifying that a defendant in a criminal case did or did not have the requisite mental state or condition constituting an element of the crime charged, as ultimate issues are matters for the trier of fact."[187] In this situation, Birkenhauer did unambiguously stat[e] his opinion of the specific mental state … in terms of [Harris's] purpose in possessing the guns."

However, the trial court gave a detailed opinion supporting its judgment, and it was clear that Birkenhauer's testimony was only a small part of the evidence considered by the trial judge. As such, the Court agreed that the improper testimony did not fatally taint the verdict and upheld it.

TRIAL PROCEDURE / EVIDENCE - FRANKS

U.S. v. Purifoy
2010 WL 3687036 (6th Cir. 2010)

FACTS: On April 24, 2008, DEA agents executed a search warrant at a condo associated with Purifoy, in Commerce Township, Michigan. Cocaine and weapons, including a "assault rifle with a one-hundred-round drum," were found. Purifoy moved to suppress the evidence, argued that the warrant was insufficient and even recklessly false.

In the warrant affidavit, Agent DeBottis detailed information he received from three CIs, to the effect that the they "observed consistent, short-term vehicular activity at the condominium late at night." He interpreted that to indicate drug trafficking. All three CIs identified Purifoy from a photo, and Purifoy had been previously arrested for the offense. In another paragraph, DeBottis identified four vehicles Purifoy utilized. Finally, DeBottis detailed information that Purifoy owned the condo and one of the vehicles under an alias. (Another vehicle was owned by a "nominee.") Finally, the affidavit detailed a search of a trash container that included plastic bags and other indicia of drug trafficking.

[186] U.S. v. Pearce, 912 F.2d 159 (6th Cir. 1990).
[187] U.S. v. Combs, 369 F.3d 925 (6th Cir. 2004).

Purifoy was indicted and moved for suppression of the search warrant. (Although he characterized it as a Franks[188] hearing, the Court did not do so, and the Court indicated that it was in fact more of a pre-Franks hearing.) The court agreed that there were errors in the warrant, including a misidentification of another individual. He took a conditional guilty plea and appealed.

ISSUE: Does a reasonable mistake in a warrant trigger a Franks hearing?

HOLDING: No

DISCUSSION: The Court reviewed the information, and noted that "Purifoy has produced no evidence that statements in the affidavit were recklessly or knowingly false." Although the agent was mistaken in the identification of an individual, it was a reasonable mistake. "A reasonable misidentification cannot be made 'recklessly' and a mistake cannot be made 'knowingly.'" The mistakes were "of relatively little consequence to the overall portrait painted by the affidavit."

Finally, "Purifoy contends that the information provided by the confidential sources should be disregarded in this case because this information was not sufficiently corroborated by the DEA agents." "When confronted with hearsay information from a confidential informant or an anonymous tipster, a court must consider the veracity, reliability, and the basis of knowledge for that information as part of the totality of the circumstances for evaluating the impact of that information."[189] "While independent corroboration of a confidential informant's story is not a *sine qua non* to a finding of probable cause, in the absence of any indicia of the informants' reliability, courts insist that the affidavit contain substantial independent police corroboration."[190]

The denial of the motion to suppress was affirmed.

TRIAL PROCEDURE / EVIDENCE – CORROBORATION RULE

U.S. v. Brown
617 F.3d 857 (6th Cir. 2010)

FACTS: In April, 2006, Helms reported that a pistol and necklace had been stolen from his Cleveland, TN, home. He suspected Brown was the thief and reported this to Det. Harbison. The detective found Brown sleeping on a couch at his cousin's home. Upon request, Brown agreed to go outside, where Helms stood waiting. The two explained that Helms just wanted his gun back and that if he handed it over, Brown could go back to what he was doing. Brown said he'd traded the gun for methamphetamine and that he could get it back, but would not say where it was.

He was taken to the police station and given Miranda rights, which he waived. He gave a recorded confession. He reiterated that he would get the gun back. A few days later, his mother called with the same offer. The gun was never recovered.

[188] Franks v. Delaware, 43
[189] U.S. v. Helton, 314 F.3d 812 (6th Cir. 2003).
[190] U.S. v. Frazier, 423 F.3d 526 (6th Cir. 2005).

Brown was indicted for being a felon in possession of a firearm on the basis of his confession "that he had taken - and therefore possessed - Helms' gun." When reinterviewed, he changed his story, saying that the gun he had traded was not Helms' gun. He revised his story further a few minutes later, saying his friend had broken into the house and subsequently gave him the gun. He again offered to help find the gun.

At trial, he recanted his confession, saying he could not remember speaking with the officers or admitting that he'd ever possessed any guns. He was convicted and moved for acquittal. Brown argued that "the only thing linking him to the crime was his uncorroborated confession", which under the Federal Rules of Evidence could not sustain his conviction. The trial court agreed and reversed his conviction, and the government appealed.

ISSUE: Does a confession require some corroboration?

HOLDING: Yes

DISCUSSION: The Court began by noting that a "dusty doctrine of criminal law—the "corroboration rule"—lies at the heart of this appeal." In Opper v. U.S., the Supreme Court adopted the English common law that "says that no one may be convicted of a crime based solely on his uncorroborated confession."[191] The rule requires "prosecutors to demonstrate through independent evidence that the crime occurred before they could use an accused's own statements to establish guilt."[192] The current version embraces a variation on the rule, requiring instead that the government show "substantial independent evidence which would tend to establish the trustworthiness of the statement." The Court also held that even a voluntary inculpatory confession might be unreliable.

The Court continued:

> Developments in interrogation law provide one source of uncertainty about the modern role of the rule. Another source is the development of modern sufficiency of the evidence rules. Years after adopting the corroboration rule, the Supreme Court recognized that criminal defendants have a due process right to have their convictions supported by evidence that leaves no reasonable doubt about their guilt.[193]

The Court agreed that there was sufficient independent evidence to corroborate Brown's confession - the items were indeed stolen. "Independent corroboration of one part of the statement may corroborate the entire statement, including the part in which Brown admits possessing a firearm." "Brown offers no explanation how he could steal something yet never "possess" it.

The Court reversed Brown's acquittal and remanded the case for further proceedings.

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[191] 348 U.S. 84 (1954).
[192] Smith v. U.S., 348 U.S. 147 (1954); U.S. v. Calderon, 348 U.S. 160 (1954).
[193] Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358 (1970).

TRIAL PROCEDURE / EVIDENCE – PROOF

U.S. v. Flint
2010 WL 3521922 (6th Cir. 2010)

FACTS: On June 18, 2007, Flint (aka Black) and his cousin Roney (aka Man) traveled from Cleveland and Detroit. Their intent was to deliver a dog to Flint's son, who was visiting his mother in Detroit for the summer. Two women accompanied them, Crawley (aka Shay) and Jane (aka Boss), who was 15, but who routinely lied about her age. She had been living on the street for some time and "looked and acted older."

The couples had some money, but did not bring a change of clothes. Only Crawley had ID. When they arrived, Flint's son was not home, so they visited Roney's relatives. They went to a nude-dancing establishment operated by one of Roney's relatives, to try to get the girls work, but they lacked proper paperwork. "Thus thwarted, Flint and Roney discussed the possibility of having the girls engage in a little prostitution, but instead, they bought some marijuana, smoked it, and drove around the city, sightseeing." They slept in the vehicle that night, but the next day, rented a hotel room, which Flint paid for. They bought some clothing, more marijuana and Ecstasy, "which the two women quickly ingested." The four engaged in sex during the day and evening as well. That night, Flint and Roney took the women to a area known for prostitution, and the women engaged a customer who they took back to the hotel room. The women returned to the area. "But, during the evening, undercover police surveying the area had taken note of the two women because they were dressed alike and were unknown to the police officers, who were familiar with the regular prostitutes." The next morning, they followed Crawley and Roney to the hotel, where they met up with Flint. "The police approached and while they were questioning these three, Jane arrived. At first, the three claimed they did not know her, but eventually admitted that they did (and she them). However, none knew the others' real names. Realizing she was a minor, Jane was questioned by the officers and after lying, she finally admitted she was 15.

Flint was charged with federal charges relating to sex trafficking and interstate transportation of minors for prostitution. At trial, he insisted he did not know Jane was a minor, and even one of the testifying officers testified Jane looked like an adult. Jane testified that she had admitted to Roney and Flint that she was 16.

Flint also argued that the idea of prostitution "had come up only after they were in Detroit." "Crawley testified that the prostitution was her idea and that she had not formed the idea until they had been rebuffed at the strip club."

Flint was convicted on sex trafficking of children and interstate transportation of minors for prostitution. He appealed.

ISSUE: Does an interstate transportation charge require that the subject be brought over state lines to commit prostitution?

HOLDING: No

DISCUSSION: Flint argued that he could not be convicted for interstate commerce because it could not be proven "that the idea for prostitution was formed while the foursome was still in Ohio." The court found the idea meritless since nothing in the law "requires that the formation of the idea and the carrying out of the idea occur in different states." His actions, including renting a hotel room, indicated that his activities "affected interstate commerce." The Court also agreed that the statute does not require that a defendant who transports a juvenile across state line "conceive an intent (to engage in sex trafficking) prior to crossing state lines," but agreed that there was ample evidence that in fact, he did have the intent. There was substantiation that he coached Jane in how to be a prostitute and purchased items for her to forward that intent. There was also evidence (Jane's testimony) that Flint knew she was a minor.

The Court also noted that the transportation charge actually did not require that he intend to engage in prostitution, only that he intended to have sex with the minor. This would "include not only prostitution but sex with the underage victim." Further, the fact that "they knew exactly where to take her, told her exactly what to do and how much to charge, and lurked nearby while she attempted to solicit customers" indicated he intended to have her engage in sex while in Michigan.

Flint's convictions were affirmed.

EMPLOYMENT - USERRA

Escher v. BWXT Y-12, LCC
2010 WL 4024951 (6th Cir. 2010)

FACTS: In 2005, BWXT received an anonymous complaint about Escher, an employee. The complaint indicated that Escher "was doing personal, Naval Reserve business while at BWXT." A review of his email indicated he was doing substantial correspondence during his work day and a review of the phone system at a later date indicated he made a great number of local and long-distance calls related to the Naval Reserves as well.

Escher was placed on leave and investigated. Johnson, his supervisor, reviewed the emails and made a rough estimate of the time expended on the emails. She found it was not incidental and there was no evidence to support his assertion that he was making up the time. "Johnson, a former military officer, hesitated to fire Escher for his Naval Reserve work."

After conferring with the President and General Manager, however, she decided to fire him. Escher later complained that his military leave was being charged incorrectly. Escher filed suit alleging a violation of USERRA, state law and for retaliation of his complaints. The District Court found in favor of the employer and Escher appealed.

ISSUE: For USERRA, must the military service be proven to be the motivating factor in an adverse action?

HOLDING: Yes

DISCUSSION: The Court reviewed the retaliation provisions of USERRA, 38 U.S.C. §4311(b). In such claims, the employee "bears the initial burden of showing, by a preponderance of the evidence, that his protected status was a motivating factor in his adverse employment action. To establish "actionable retaliation, the relevant decision maker, not merely some agent of the defendant, must possess knowledge of the plaintiff's protected activity."[194]

The Court agreed that the evidence that the investigation occurred less than a month after his complaint, and the fact that some members of the company knew of the complaint did "not form a basis for an inference of discriminatory motive." His actions "hit a threshold" that the company had already terminated one employee for doing what Escher has been doing, and there was no indication that his military service was a motivating factor in terminating Escher. Despite his assertion that he had management approval for his actions, there was no indication that the management "knew the extent of Escher's e-mail use and condoned that use."

The Court found no evidence that "his protected status was a motivating factor in the adverse employment action." In addition, "even if he could, BWXT can show that it would have taken the adverse action anyway, for a valid reason." The Court affirmed the dismissal of the lawsuit.

EMPLOYMENT – FIRST AMENDMENT

Kelly v. Warren County Board of Commissioners
2010 WL 3724599 (6th Cir. 2010)

FACTS: Kelly worked as a 911 operator in the 1980s, and then moved on to be a police officer in Hamilton County, Ohio. In 1995, Sheriff Ariss (Warren County, Ohio, Sheriff's Office) reviewed his application "to be a full-time deputy and determined that Kelly's background left him unsuited for the job." Following this, Kelly continued as a police officer and clashed with his employer and filed suit against the Chief and the department in 2000. He alleged that he was threatened with firing for exposing the Department's shortcomings. He was hired by Lynchburg PD in 2001, but terminated when he "accused the police chief of destroying evidence and assaulting a juvenile." He then moved on to CSX railroad, where he was terminated after threatening a hearing officer. He contacted Young and asked to return to work as a 911 dispatcher. He revealed two misdemeanor convictions and explained that Sheriff Ariss might object. He was conditionally hired, subject to a background check. The Board of Commissioners was contacted by several parties, including Sheriff Ariss and Prosecutor Hutzel, about the hiring. Eventually the Board rescinded the provisional employment offer.

Kelly sued the Board, Sheriff Arris and Hutzel under 41 U.S.C. §1983, alleging that he was suffering discrimination because of protected First Amendment activities. The Board's response was that "Kelly's checkered background, not his protected speech, persuaded it of Kelly's unfitness to serve as a dispatcher."

Although the Court found that Kelly's actions constituted protected conduct, and that the Board perpetrated an adverse employment action when it refused to hire him, it concluded that Kelly did not present sufficient evidence to support the contention that his protected conduct motivated the

[194] Mulhall v. Ashcroft, 287 F.3d 543 (6th Cir. 2002); Fenton v. HiSAN, Inc., 174 F.3d 827 (6th Cir. 1999).

Board's decision."[195] Ariss and Hutzel received summary judgment based upon qualified immunity, and "Kelly failed to provide sufficient evidence of retaliation to hold them liable in their official capacities." Kelly appealed.

ISSUE: Must the exercise of a First Amendment right be proven to be the motivating factor in an retaliation case?

HOLDING: Yes

DISCUSSION: First, "[t]o establish a prima facie case of First Amendment retaliation against the Board under 1983, Kelly must establish that: (1) he engaged in protected conduct; (2) he suffered an adverse action likely to chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) his protected conduct was a substantial or motivating factor in the adverse action."[196] When a potential public employee seeks to demonstrate protected conduct in the First Amendment retaliation context, he must show that the speech touched on a matter of public concern.[197] If Kelly makes the prima facie showing, the burden shifts to the Board.[198] The Court stated that the Board may defeat Kelly's claim by showing either that, under the balancing test established by Pickering v. Board of Education[199], the Board's legitimate interest in regulating employee speech to maintain an efficient workplace outweighed Kelly's First Amendment rights, or that under the mixed-motive analysis established by Mt. Healthy, it would have rescinded Kelly's offer even absent his protected conduct."

Kelly failed to "establish that his protected conduct motivated the Board's decision to rescind its offer [which] dooms his retaliation claim." Instead, "direct evidence reveals that neither of Kelly's two protected activities—campaigning for Ariss's opponent and suing Duvelius—prompted the Board to rescind its offer."

Kelly argued that nether employee was rehired under questionable circumstances and the Court agreed, "though disparate treatment can give rise to an inference of unlawful motives[200], Kelly's attempted comparison misses the mark." The Court agreed that his checkered history "prompted the Board to believe that he could not establish the required trust with the law enforcement personnel who would rely on him for their safety."

The court continued:

> The provisional-hire policy afforded the Board a safety valve, allowing it to reject candidates whom, though recommended and conditionally hired at the urging of a supervisor, the background check disqualified. Even if the Board confirmed all previous individuals' provisional employment offers after looking into their

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[195] The Court stated: "Because Kelly's claim against the Board fails on the merits, we proceed as if Kelly presented sufficient evidence of a county policy or custom underlying the Board's refusal to hire him to satisfy the Monell policy or custom requirement." See Monell v. New York Dept. of Soc. Servs. , 436 U.S. 658 (1978).

[196] Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999).

[197] Connick v. Myers, 461 U.S. 138 (1983).

[198] Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[199] 391 U.S. 563 (1968).

[200] Arnett v. Myers, 281 F.3d 552 (6th Cir. 2002)

> background, its failure to do so here does not evidence a departure from normal procedure unless Kelly demonstrates that background checks of other candidates revealed similarly disconcerting information, a showing he fails to make.

The Court found the retaliation claim against the Board must fail.

Further, the Court agreed that he was unable to show a valid claim against Ariss and Hutzel. "The only adverse action Kelly complains of is the Board's refusal to hire him. Ariss and Hutzel counter that "they cannot be liable for the Board's decision because the Board possessed final hiring authority." The Court looked to Fritz v. Charter Twp. of Comstock[201], but noted that "even if Ariss and Hutzel expressly encouraged South to vote against Kelly's hire because of his protected conduct, and the Board did just that, Kelly fails to present evidence that either individual held sufficient influence over the Board to deter a person of ordinary firmness from exercising his free expression rights."

The Court upheld the summary judgment in favor of Ariss and Hutzel.

MISCELLANEOUS

Sheffield v. City of Fort Thomas, Kentucky
620 F.3d 596 (6th Cir. 2010)

FACTS: Between 1950 and the present, the deer population of Kentucky had increased dramatically (five-hundredfold). The area of Fort Thomas was considered to have reached "saturation point," and "residents have suffered increasingly from motor vehicle collisions with deer, landscaping damage due to deer, and other cervid-perpetrated problems." Fort Thomas City Council worked with Kentucky Fish & Wildlife to develop a deer-management policy and ultimately took a three part approach - educating the public, prohibiting deer feeding, and authorizing bow hunting within the city limits. The latter two required some changes to local ordinance, as did a change to permit field-dressing of the deer carcasses. Kelly and Sheffield filed suit, arguing that the ordinances in question were preempted by state statute and regulation. The trial court found in favor of Fort Thomas and they appealed, but Kelly dropped out of the lawsuit.

ISSUE: May a local ordinance conflict with a state regulation?

HOLDING: No

DISCUSSION: Sheffield argued that the ordinances in question were preempted by KRS 150 and administrative regulations promulgated by Fish & Wildlife. The Court noted that KRS 150 did not address whether hunting is allowed in urban areas nor did it address the disposal of deer carcasses. Kentucky does have extensive regulation in the area of hunting, however.

The Court noted that Kentucky is a Home Rule State - KRS 82.082, and that a city may enact any law that is "not in conflict with a constitutional provision or statute." Conflict exists where an action

[201] 592 F.3d 718 (6th Cir. 2010)

is "expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject embodied in" the KRS.

The Court noted that the bow ordinance in question did not conflict with the bow hunting provisions in the law, since it did not affirmatively state the deer may be hunted but simply that "arrows may be discharged from bows and crossbows" during the time frame - and the text was "entirely agnostic as to the purpose behind the discharge: it might be for the purpose of hunting deer, state law and regulations permitting, but it might also be for target practice or any number of other reasons."

The Court agreed that ordinance was not preempted by the regulation, and that it was permissible for a city to designate whether weapons of any type could be discharged within that city.

With respect to the field-dressing ordinance, which required, in effect, that all blood and offal be properly disposed of, the Court concluded it was not technically a part of hunting anyway. The Court noted "while field dressing follows close on the heels of the kill *chronologically*, it is arguably *conceptually* related just as closely, if not more so, to the process of butchering and meat preparation, which falls well outside the scope of Chapter 150."

The Court agreed that cities have the lawful ability to take appropriate "local public health and sanitation measures." The Court agreed that provision was not preempted.

Finally, with respect to the deer feeding provisions, which prohibited all recreational feeding on all public and private property, Fort Thomas noted that the provisions were not limited to deer, but would cover all wildlife. The Court agreed that it was arguably in conflict with 301 KAR 2.015, which does allow recreational feeding of wildlife on one's curtilage. The trial court had ruled that the home rule provisions prohibit preemption with state statute, but not that it did not prohibit preemption of state regulation.

However, the Court viewed it from a broader perspective, and was satisfied that "the Kentucky Supreme Court would hold that state regulations have the same preemptive force as statutes." Since the Court had already agreed that ""[a]dministrative regulations properly adopted and filed have the force and effect of law, . . . and . . . have the same effect as statutes . . . enacted directly by the legislative body from which the administrative agency derives its authority."[202] Most legal authorities have agreed that state regulations have preemptive force.

The Court agreed that while it may be improper to ban deer-feeding within the curtilage, it was "a legitimate exercise of municipal authorities as applied to deer-feeding outside the curtilage of a home."

Finally, the Court did not find that allowing bow hunting impacted Sheffield's right to be free from bodily harm, as he argued that allowing such hunting did so. The Court noted that many actions by the government might have some "incremental impact on the probability that death will result in any given situation" - such as raising the speed limit.

[202] Rietze v. Williams, 458 S.W.2d 613 (Ky. 1970)

As such, the Court continued:

> However, because "many state activities have the potential to increase an individual's risk of harm" by private actors, we restricted the application of this so-called "state-created danger" doctrine to scenarios where (1) there is a "special relationship [such as warden-prisoner] between the state and either the [plaintiff] or the private tortfeasor"; or (2) the state's actions cause a "special danger" to the plaintiff, i.e., "place [him] *specifically* at risk, *as distinguished from a risk that affects the public at large*." Sheffield does not claim any special relationship, and nothing in the record establishes that the Bow-and-Arrow Ordinance places *him* "specifically at risk," as distinguished from the citizenry of Fort Thomas at large. Accordingly, Sheffield has not established a cognizable infringement of his fundamental rights.

The case was reversed as indicated with the discussion, albeit partially affirmed on the issue of feeding deer in the curtilage.